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No. 04-831

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY and MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Petitioners,

v.

KELLI SMALLWOOD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the fraudulent joinder rule, an in-state defendant is fraudulently joined if the plaintiff cannot establish a cause of action against the in-state defendant in state court. This case presents the question whether there is an exception to this rule of fraudulent joinder when the plaintiff cannot establish a cause of action against both the in-state defendant and the out-of-state defendant based on a "common defense."

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioner Illinois Central Railroad Company states that it is a wholly owned subsidiary of Illinois Central Corporation. Illinois Central Corporation is a wholly owned subsidiary of Grand Trunk Corporation. Grand Trunk Corporation is a wholly owned subsidiary of Canadian National Railway Company. Petitioner Mississippi Department of Transportation is an agency of the Mississippi state government.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Illinois Central Railroad Company ("Illinois Central") and Mississippi Department of Transportation ("MDOT") respectfully request that a writ of certiorari issue to review the en banc decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The court of appeals' en banc opinion (Appendix ("App.") 1a-37a) is reported at 385 F.3d 568. The order of the court of appeals granting rehearing en banc (App. 76a) is reported at 355 F.3d 357. The opinion of the court of appeals reversing the district court and ordering the case remanded to the state court from which it was removed (App. 38a-52a) is reported at 342 F.3d 400. The opinion and order of the United States District Court for the Southern District of Mississippi granting Illinois Central's Motion for Summary Judgment (App. 53a-63a) is not reported. The opinion and order of the district court denying Smallwood's Motion to Remand (App. 64a-75a) is reported at 203 F. Supp. 2d 686.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 10, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1332 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States . . . .

28 U.S.C. § 1441 provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

INTRODUCTION

In a sharply divided 9-7 decision purportedly based on this Court's 1914 decision in *Chesapeake & Ohio Railway* v. *Cockrell*, 232 U.S. 146, the en banc Fifth Circuit departed from more than 100 years of removal jurisprudence. For more than a century, this Court and the courts of appeals have disregarded the citizenship of non-diverse or in-state defendants fraudulently joined if the court finds that the plaintiff has no possibility of success on any state-law claims against the in-state defendant. But now the Fifth Circuit has followed the Third Circuit in rejecting the traditional test for fraudulent joinder and creating an unwarranted exception to this objective, easily administered rule. In those circuits, there is now no diversity, even though a defendant has been fraudulently joined, so long as the plaintiff's claims against

the in-state and the diverse or out-of-state defendant are equally meritless as a result of a "common" defense. App. 7a-8a.

The Fifth Circuit's holding deepens an already mature conflict among the circuits on this issue, with the Ninth Circuit squarely rejecting the holding of the Third and Fifth Circuits on the proper interpretation of the fraudulent joinder rule and hence the federal removal statute. See 28 U.S.C. § 1441. And, significantly, the broadening conflict also reflects conflicting interpretations of a decision of this Court, *Cockrell*, whose import is now in need of clarification. Moreover, this is a recurring and, as the en banc majority acknowledges in understatement, "not unimportant" issue, see App. 1a, that plainly affects the fundamental federalism balance embodied in section 1441. Indeed, both the recurring nature and the importance of the issue are illustrated by the fact that another petition for certiorari raising the same issue is currently pending before the Court. See *Collins* v. *American Home Prods. Corp.*, 343 F.3d 765 (5th Cir. 2003), *petition for certiorari filed*, No. 04-674 (U.S. Nov. 12, 2004).

The lack of uniformity in the administration of this important federal statute is fundamentally unfair; a defendant's right to a federal forum should not vary depending upon whether it is resident in California or Mississippi. The Fifth Circuit decision is also wrong. It alters an established statutory interpretation and unsettles federal removal jurisprudence without congressional sanction; and it replaces a simple, objective inquiry related directly to the in-state defendant with a rule that requires a court deciding the procedural question of removal to address the merits of the entire case. It also allows a plaintiff who seeks to evade removal to circumvent the fraudulent joinder rule by asserting the same meritless claim against both the in-state and the out-of-state defendants. In this way, out-of-state defendants can be deprived of the federal forum to which they

are statutorily entitled. Review by this Court is clearly warranted.

STATEMENT OF THE CASE

On June 23, 2000, a train operated by petitioner Illinois Central collided with an automobile driven by respondent Kelli Smallwood ("Smallwood") at a railroad crossing in Florence, Mississippi. At the time of the accident, the railroad crossing was equipped with federally-funded warning devices that did not include crossing gates.

On June 21, 2001, Smallwood filed suit in Mississippi state court against MDOT, a resident of Mississippi for purposes of determining diversity jurisdiction, and Illinois Central, an out-of-state defendant. She alleged that: (1) MDOT negligently failed to seek authorization to install crossing gates at the subject grade crossing prior to 1999, when it allegedly determined that additional warning devices were needed; and, (2) MDOT and Illinois Central negligently delayed installing crossing gates once federal funds were authorized for that purpose.

Illinois Central timely removed the action to the United States District Court for the Southern District of Mississippi. In the removal petition, Illinois Central alleged that Smallwood fraudulently joined MDOT on the ground that Smallwood's claims against MDOT are unquestionably preempted by the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 *et seq.* See *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 353-59 (2000); *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 666 (1993). Thereafter, Smallwood filed her motion for remand.

In deciding the Motion for Remand, the district court followed long-standing precedent in determining whether MDOT was fraudulently joined. The district court pierced the pleadings for the limited purpose of determining whether there was any possibility that the in-state defendant could be

held liable under state law for any of Smallwood's claims against it. In doing so, the district court examined the in-state defendant's affirmative defense of federal preemption in order to determine whether there was any possibility that Smallwood could prevail against MDOT. If not, under established law, MDOT was fraudulently joined. See *Sid Richardson Carbon & Gasoline Co.* v. *Interenergy Res., Ltd.*, 99 F.3d 746, 753 (5th Cir. 1996) ("[s]hould the defendant[] prevail on any of [its affirmative defenses to plaintiff's claims], it necessarily follows that joinder was fraudulent").

The district court denied Smallwood's Motion for Remand, finding that MDOT could not be held liable for any of Smallwood's claims against it and was therefore fraudulently joined such that diversity jurisdiction existed. See App. 73a-75a. Subsequently, the district court granted Illinois Central's motion for summary judgment. The court found that Smallwood's claim against Illinois Central for negligent delay in installing authorized warning devices constituted a challenge to the adequacy of the federally-funded warning devices in place at the time of the accident, and was thus preempted by the FRSA. See *id.* at 55a-56a.

On appeal, a panel of the Fifth Circuit adopted the so-called "common defense" exception to the fraudulent joinder rule that was first announced by the Third Circuit in 1990. See App. 49a-51a (relying on *Boyer* v. *Snap-On Tools Corp.*, 913 F.2d 108 (3d Cir. 1990)). Pursuant to the "common defense" rule, as the exception was denominated by the panel, a determination of fraudulent joinder is made by reference to the defenses of the *out-of-state defendant*. See *id.* at 42a-46a. If the *out-of-state* defendant shares a common defense with the in-state defendant, then the district court may not find that the in-state defendant was fraudulently joined, even if there is no possibility that the in-state defendant can be held liable under state law. See *id.* Based on the preemption defense asserted by both Illinois Central and MDOT, the panel reversed the district court's finding of subject-matter

jurisdiction based on fraudulent joinder, and ordered the case remanded to the state court. See *id.* at 50a-52a.

The court of appeals granted en banc review. See App. 76a. By a vote of 9-7, a majority of the Fifth Circuit interpreted this Court's decision in *Cockrell* as mandating that fraudulent joinder be determined by reference to the defenses asserted by the out-of-state defendant. The court held that if the defenses of the in-state and out-of-state defendants are "common" and dispositive of the case as a whole, there is no fraudulent joinder and removal is precluded. See *id.* at 7a-11a.

The majority's application of the fraudulent joinder rule sparked sharply critical dissents, with the primary dissent written by Judge E. Grady Jolly on behalf of seven members of the court. Judge Jolly's dissent perceived no support for the majority's rule in *Cockrell*, finding the holding of that case to be a straightforward application of established fraudulent joinder principles. In *Cockrell*, the plaintiff clearly stated a claim for relief under state law against the in-state railroad employees, thereby defeating diversity. Thus, *Cockrell* says nothing about what happens when the in-state defendant cannot possibly be liable under state law or whether there is a "common defense" exception in this situation.

The dissent also criticized the majority for doing precisely what it claimed to be avoiding – mixing the issue of joinder with the merits of the case. Under the common defense rule, a federal court necessarily expands its focus beyond the mere joinder of the in-state defendant and considers the nature of the broader claims. The dissent argued that it is not accurate to describe this new approach as more faithful to the rule that the focus should be on "the joinder of the non-diverse defendant – *not* on the merits of the case." App. 20a.

REASONS FOR GRANTING THE PETITION

For more than 100 years, federal courts have used a simple test to determine whether a defendant has been fraudulently joined to defeat diversity jurisdiction – whether the plaintiff can establish a claim against the in-state defendant in state court. See, *e.g.*, *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 185-86 (1907); *Lathrop, Shea & Henwood Co.* v. *Interior Constr. & Improvement Co.*, 215 U.S. 246, 250-51 (1909). If the answer to this objective question is "no," then the in-state defendant is deemed fraudulently joined and its presence is ignored for purposes of determining whether removal was proper. Relying on this Court's 1914 decision in *Chesapeake & Ohio Railway* v. *Cockrell*, 232 U.S. 146, the deeply-divided Fifth Circuit radically altered the century-old test for fraudulent joinder. Under its new standard, a defendant is fraudulently joined if the plaintiff could not possibly prevail against the in-state defendant, *unless* the plaintiff also cannot prevail against the out-of-state defendant on the same ground. App. 42a-46a. This exception to the fraudulent joinder rule has been denominated the "common defense" rule. *Id.* at 46a.

In adopting this new test, the Fifth Circuit acknowledged that it was following the lead of the Third Circuit, which had earlier misinterpreted *Cockrell* and altered the long-settled rules of fraudulent joinder. App. 9a & n.21. The court also recognized that its holding brought it directly into conflict with the Ninth Circuit, *id.* at 9a n.21, and implicitly into conflict with other circuits that assess fraudulent joinder by inquiring whether the plaintiff can prevail against the in-state defendant but do not address whether the plaintiff can prevail against the out-of-state defendant on the same ground. Necessarily, the conflict as to the proper application of the fraudulent joinder rule means that the courts of appeals are in conflict about the meaning of *Cockrell* and the meaning of the removal statute, 28 U.S.C. § 1441(b), which authorizes

removal when all "properly joined" defendants are out-of-state defendants.

The issue is both recurring and important. The federal removal statute is a routinely employed tool of federal civil procedure, governing many hundreds of cases each year; and its application determines whether a case will be heard in federal or state court. "[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). Thus, a conflict concerning the proper test for determining when a defendant is "properly joined" will persistently affect the exercise of federal court jurisdiction and should not be tolerated. A lack of uniformity in the interpretation of the removal statute is fundamentally unfair to litigants. Defendants should not be denied a federal forum if that is their preference and right because the complaint was filed in a state in the Fifth Circuit rather than the Ninth or Seventh Circuits. And, the consequences are also significant for MDOT which faces a very real prospect of being joined as a litigant in all railroad crossing cases in Mississippi for the illegitimate purpose of depriving out-of-state defendants of the federal forum to which they are entitled.

Finally, the Fifth Circuit's new common defense rule alters the fraudulent joinder rule, and hence effectively and impermissibly amends section 1441, a task reserved for Congress. It makes no sense to adopt a rule that requires the federal court to determine whether a plaintiff's case lacks merit as against any defendant in order to decide whether the in-state defendant was "properly" or improperly "joined" within the meaning of the statute. Only this Court can restore a uniform interpretation to the federal removal statute, and it should therefore grant the petition.

I. THE CIRCUITS ARE IN CONFLICT ABOUT THE SCOPE OF THE FRAUDULENT JOINDER RULE AND THE FEDERAL REMOVAL STATUTE.

Defendants have the right to remove a civil action that is within the federal courts' original jurisdiction from state court to federal court. A case may be removed based on the federal courts' diversity jurisdiction "if none of the parties in interest *properly joined* and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (emphasis supplied). Since 1877, defendants have been permitted to show that an in-state defendant was not a party "properly joined," but was instead fraudulently joined. Such defendants do not defeat the federal courts' diversity jurisdiction, and their presence may be ignored for the purpose of determining the propriety of removal. See *Arapahoe County* v. *Kansas Pac. Ry.*, 1 F. Cas. 1080, 1082 (D. Colo. 1877); *Wecker*, 204 U.S. at 185-86.

For roughly a century, the sole focus of a district court's fraudulent joinder inquiry in cases alleged to be in the court's diversity jurisdiction was the in-state defendant, and the viability of the plaintiff's state law claims against him.[1] As Judge Jolly correctly summarized in his dissenting opinion:

> Up until today, our precedent has been rooted, established and clear, having evolved through the writings of solid and respected judges over many years. It asks a simple question and, eschewing personal motives of the plaintiff, applies an objective test to produce a fair answer: When a diverse defendant removes to federal court on grounds of fraudulent

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[1] An in-state defendant's fraudulent joinder can be established in either of two ways: (1) fraud in the pleading of the relevant jurisdictional facts (*i.e.*, alleging that the defendant resides in-state when it does not), or (2) the inability of the plaintiff to establish a cause of action against the in-state defendant in state court. *See* App. 5a. This case concerns only the second test for fraudulent joinder. *Id.*

joinder, we only ask, as the majority opinion acknowledges:

> "[W]hether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." [App. 13a (quoting App. 5a (majority opinion).]

See *id.* at 16a (Jolly, J., dissenting) (describing this as the "traditional test" for fraudulent joinder); *id.* at 13a ("if our objective test determines that the plaintiff cannot recover, then the in-state defendant is deemed fraudulently joined") (citing 16 James W. Moore et al., *Moore's Federal Practice* § 107.14[2][c][iv][A] (3d ed. 2004)).

This well-established rule of fraudulent joinder, which also represents an interpretation of the federal removal statute, is now the subject of a broadening conflict. As noted, the Fifth Circuit's new common defense rule fundamentally alters the way in which district courts determine whether an in-state defendant has been fraudulently joined by expanding the jurisdictional inquiry to include the plaintiff's claims against the out-of-state defendant, and by foreclosing fraudulent joinder when the in-state and out-of-state defendants share a common, dispositive defense to the plaintiff's claims.

The court below is the second court of appeals to adopt the "common defense" rule. See App. 8a (citing *Cockrell*, 232 U.S. at 153). In doing so, the Fifth Circuit expressly embraced an earlier decision of the Third Circuit. *Id.* at 9a & n.21. And, it was the Third Circuit that first announced the discovery of a "new" rule of removal that had been overlooked by federal courts for most of the 20th Century. See *Boyer* v. *Snap-On Tools Corp.*, 913 F.2d 108, 113 (3d Cir. 1990). Like the Fifth Circuit, the Third Circuit invoked this Court's decision in *Cockrell*, and held that "where there

are colorable claims or defenses *asserted against or by diverse and non-diverse defendants alike*, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses." *Id.* (emphasis supplied). See also *id.* at 112-13 (holding that in-state defendants were not fraudulently joined because in-state and out-of-state defendants raised the same "equally applicable" defense to the plaintiff's claims). Indeed, and again like the Fifth Circuit, the Third Circuit believed that the common defense exception to the fraudulent joinder rule is *required* by *Cockrell*. *Id.*

The Third Circuit's analysis in *Boyer* has been rejected by the Ninth Circuit. In *Ritchey* v. *Upjohn Drug Co.*, 139 F.3d 1313, 1318-20 (9th Cir. 1998), the in-state and out-of-state defendants shared a "common" statute of limitations defense which the circuit court expressly acknowledged was dispositive of the case in its entirety. The Ninth Circuit nonetheless found that the in-state defendants were fraudulently joined, explaining that although the plaintiff "*did not state a cause of action against anyone*, . . . his failure to state that cause of action against [the in-state defendants] demonstrates beyond peradventure that [the in-state defendants] were sham defendants for purposes of removal." See *id.* at 1320 (emphasis supplied). Neither *Ritchey*'s analysis nor the legal standard it adopts can be reconciled with *Boyer*; indeed, the *Ritchey* court cited *Cockrell* and thus clearly did not read that case as the Third and Fifth Circuits have. See *id.* at 1318. The Seventh Circuit, too, has implicitly declined to adopt *Boyer* by finding fraudulent concealment based on a defense that was available to all defendants. See, *e.g.*, *LeBlang Motors, Ltd.* v. *Suburu of Am., Inc.*, 148 F.3 680, 691-92 (7th Cir. 1998) (finding fraudulent joinder based on statute of limitations defense that was common to defendants).

In its en banc opinion, the Fifth Circuit acknowledged that it was deepening the extant split in the circuits on the question

whether an in-state defendant is fraudulently joined when there is no possibility that defendant can be liable based on a "common" defense that is dispositive of the case. The court recognized that it was following *Boyer* and rejecting the analysis and rule established by the Ninth Circuit in *Ritchey*. See App. 9a n.21. The Court should grant this petition to resolve the inter-circuit conflict on this important question of federal law.

II. THE DECISION BELOW READS THIS COURT'S DECISION IN *COCKRELL* INCORRECTLY AND CREATES A CONFLICT IN THE CIRCUITS CONCERNING ITS MEANING.

Ignoring decades of consistent interpretation and application of the rules of fraudulent joinder and the federal removal statute, the court below and the Third Circuit have adopted a new rule governing fraudulent joinder based on this Court's venerable decision in *Cockrell*. Like the Third Circuit in *Boyer*, the court below relied on the following passage:

> As no negligent act or omission personal to the railway company was charged and its liability, like that of the two employés, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants. Plainly, this was not such a showing as to engender or compel the conclusion that the two employés were wrongfully brought into a controversy which did not concern them. [*Cockrell*, 232 U.S. at 153.]

Finding the above-quoted language of *Cockrell* to be a "clear" statement that a "showing that the plaintiff's case is barred as to all defendants is not sufficient" for fraudulent joinder purposes, the Fifth and Third Circuits have grafted the

common defense rule onto the traditional test for fraudulent joinder. App. 8a.

As the Ninth Circuit recognized, and the seven dissenting judges of the Fifth Circuit cogently explained, *Boyer* and the majority below seriously misread *Cockrell*. See App. 16a, 20a (Jolly, J., dissenting) (describing the Fifth Circuit's interpretation of the relevant language in *Cockrell* as "cherry-picked and shorn of context," and finding, "it is only through a strained application based on a serious misreading that the [majority] inflates the significance and relevance of *Cockrell*."). The single most important aspect of *Cockrell*, which the Fifth and Third Circuits ignored, is that the sole basis for the plaintiff's claims against the railroad was the legal doctrine of *respondeat superior*. See *Cockrell*, 232 U.S. at 150. Because the liability of the out-of-state defendant (employer/master) in *Cockrell* was *wholly derivative* of the liability of its in-state co-defendant (employee/servant), "the in-state defendants could not possibly have been fraudulently joined because their conduct was the *only* actionable conduct in the case." App. 18a (Jolly, J., dissenting). Thus, at most, *Cockrell* can be read to foreclose a finding of fraudulent joinder when there is "but one case and it [i]s against the joined defendants themselves." *Id.* It does not, however, remotely call into question the rule that an in-state defendant is fraudulently joined when the claim against it is entirely without merit. Read in context, the "pertinent language" of "*Cockrell* does not justify, much less compel the creation of the 'common-defense' rule." See *id.* at 16a, 17a (Jolly, J., dissenting).

Thus, the Fifth and Third Circuits' sweeping interpretation of *Cockrell* as entailing the adoption of the common defense rule cannot withstand a reading of the narrowly drawn and fact-specific decision. *Cockrell* simply cannot bear the weight that the Fifth and Third Circuits have laid upon it. If not overturned by this Court, moreover, the Fifth Circuit's "aberrant" interpretation of *Cockrell*, see App. 25a (Jolly, J.,

dissenting), will thwart the central purpose of the fraudulent joinder rule, which is to implement the removal statute by forestalling "devices intended to prevent a removal to a Federal court where one has that right." *Wecker*, 204 U.S. at 185-86. The decision below and *Boyer* are both incorrect interpretations of this Court's holding in *Cockrell* that disrupt the settled rules concerning the fraudulent joinder rule and alter the settled interpretation of the federal removal statute.

The Fifth and Third Circuits apparently believe that the federal courts were misreading *Cockrell* and misinterpreting the federal removal statute between 1914 and 1990, and that Congress failed to act. The more logical explanation, however, is that *Cockrell* does not say what the Fifth and Third Circuits read it to say, and that their decisions have established a rule of law most emphatically not mandated by *Cockrell* and by doing so, have created a conflict in the courts of appeals about the meaning of that decision. At the end of the day, however, the critical point is that this Court has not addressed this issue and that the courts of appeals are confused about the meaning of some of the language in *Cockrell*. The lower courts need this Court's clarifying guidance on this issue.

III. THE ISSUE PRESENTED IS RECURRING AND IMPORTANT AND THE COMMON DEFENSE RULE WILL HAVE A PROFOUND AND DAMAGING IMPACT ON REMOVAL.

Each year many hundreds of removal petitions based on the federal courts' diversity jurisdiction are filed in the district courts. In a significant portion of those cases, defendants with a right to and a preference for a federal forum assert that an in-state defendant has been fraudulently joined to prevent the court from exercising its diversity jurisdiction. The test for ascertaining fraudulent joinder is, accordingly, a recurring legal question. As the conflict among the courts of appeals reveals, the issue will continue repeatedly to arise, spurred into increased prominence by the en banc decision of the

court below – with its close division and its passionate dissenting opinions.

The issue is of critical importance for several additional reasons. First, the question raised ultimately concerns the proper scope of federal jurisdiction. "[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Allstate Ins. Co.*, 517 U.S. at 716; see also *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) (describing the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). If the Fifth and Third Circuits are wrong, then the federal courts are refusing to exercise jurisdiction where they have an obligation to do so, and depriving defendants of the federal forum to which they have a right. On the other hand, if the Fifth and Third Circuits are right, then federal courts are exercising jurisdiction that they do not have in the circuits that reject the common defense rule, at the expense of the state courts. See *Speiser* v. *Randall*, 357 U.S. 513, 523 n.7 (1958) (reciting the "basic constitutional principle that the construction of state laws is the exclusive responsibility of the state courts"). Whatever the outcome, some federal courts are either abdicating or abusing their power, and a prolonged continuation of such a situation is intolerable.

The common defense rule also will create "needless friction and conflict [within] the federal-state rubric for determining the proper forum for civil diversity actions." App. 27a (Smith, J., dissenting). The en banc majority creates this tension by "declar[ing] that the federal court is incompetent to make binding a pronouncement on the merits issues," while at the same time "*oblig[ing* the federal court] to reach non-binding conclusions" that are "simultaneously indispensable and expendable, at once both necessary and superfluous." *Id.* at 29a, 30a (emphasis in original) (Smith J., dissenting). These non-binding rulings that the removed case is "wholly lacking in merit" will be open upon remand to reconsideration

by the state court, which will "be free to disagree, to resurrect the case, and ultimately to award the plaintiff relief against the in-state and out-of-state defendants as well." *Id.* at 29a (Smith, J., dissenting).

Put differently, the common defense rule creates a process for determining removal jurisdiction that is not conducive to comity and that will ultimately and inevitably lead to state-federal conflicts. See App. 29a-30a (Smith, J., dissenting). This kind of conflict is in large part foreclosed by application of the traditional test for fraudulent joinder, because the court asks only about whether the plaintiff can state a claim against the in-state defendant *and asks only as a proxy or objective test to determine whether the defendant was "properly joined."*[2] In contrast, if a federal court must decide whether a "common defense" mandates dismissal of both the in-state and the out-of-state defendant, that decision is a determination of the merits of the case. This should not happen in the context of a removal decision. Moreover, although a federal court's decision on the merits is not binding when made on a motion to remand, for comity's sake, the state court cannot comfortably disregard it upon remand. The potential for mischief is substantial. This can easily be avoided by application of the traditional test for fraudulent joinder.

Third, the ubiquity and importance of the federal removal statute makes conflict and uncertainty in its application particularly intolerable. The federal removal statute, like the Federal Rules of Civil Procedure, is intended to establish uniform treatment of procedural and jurisdictional matters in

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[2] As Judge Jolly explained, the traditional test "does not seek to determine the 'truth' of exactly why the nondiverse defendant was joined." App. 14a. The traditional test instead produces an objective and "practical 'truth': that is, it is reasonable and fair to assume that a lawyer, acting in accordance with the code of professional responsibility, will not sue someone against whom has has no reasonable basis of recovery, unless it is for an improper reason." *Id.*

federal cases. Conflicting and chaotic interpretation and application of the removal statute is fundamentally unfair to litigants. Defendants should not be denied a federal forum if that is their preference and right, depending upon whether an action is brought in Mississippi or California.

In certain cases, moreover, the current lack of uniformity may encourage unseemly forum shopping by plaintiffs eager to stay in state court and to avoid removal to federal court. This is particularly true in certain states where out-of-state defendants believe that they are unlikely to receive a fair trial in state court, which is, of course the fundamental basis of diversity jurisdiction.[3] The interest of the in-state defendant is also at stake here. If the common defense rule prevails, MDOT will find itself joined in every railroad crossing case filed in Mississippi. This is not an imaginary fear, but a very real problem that will plague MDOT for years to come. MDOT has jurisdiction over approximately 2700 railroad crossings in Mississippi, and utilizes the $2.3 million in federal funds it receives each year to upgrade crossings in accordance with a priority index published by the federal government. MDOT will find itself litigating questions that implicate the FRSA in state court, in protracted litigation that will place added pressure on its already stretched budget, for no purpose other than depriving out-of-state defendants of a federal forum. These are precisely the interests protected by diversity jurisdiction in the federal courts. See *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-10 (1945). Indeed, because this Court's diversity jurisprudence seeks to "discourage[] forum shopping and avoid[] inequitable

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[3] In a related point, disingenuous and artful pleading will be an inevitable product in the circuits that adopt the common defense rule. In order to avoid removal, plaintiffs will attempt to frame their claims in a way that ensures a finding by the district court of common defenses. In order to avoid remand, defendants will attempt to plead defenses in a way that precludes a finding of commonality. *See, e.g.*, App. 30a (Smith, J., dissenting).

administration of the laws," review is especially appropriate here. *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965).

Fourth, the "right of removal is entirely a creature of statute," *Syngenta Crop Protection, Inc.* v. *Henson*, 532 U.S. 28, 32 (2002), whose "scope and terms . . . are entirely dependent on the will of Congress." 14B Charles Alan Wright et al., *Federal Practice and Procedure*, § 3721, at 285-86 (3d ed. 1998). Courts are generally reluctant to act when asked to adopt a rule that entails a dramatic change in a statutory interpretation that has endured for decades and in which Congress can be said to have acquiesced. See, *e.g.*, *Erie R.R.* v. *Tomkins*, 304 U.S. 64, 77 (1938) ("[i]f only a question of statutory construction were involved, we would not be prepared to abandon a [rule] so widely applied through nearly a century"); *City of Greenwood* v. *Peacock*, 384 U.S. 808, 834 (1966) (stating with regard to 28 U.S.C. § 1443, "if changes are to be made in the long-settled interpretation of the provisions of this century-old removal statute, it is for Congress and not for this Court to make them").

Had Congress at any time perceived the federal courts' application of the fraudulent joinder rule to constitute a misinterpretation of congressional intent with regard to the removal statute, Congress could have amended the statute to make this clear. It has not done so. See, *e.g. NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) ("congressional failure to revise or repeal [statutory] interpretation is persuasive evidence that the interpretation is one intended by Congress"). Congress's lengthy acquiescence in the settled interpretation of the federal removal statute is strong evidence that the federal courts have not been misinterpreting either it or the fraudulent joinder rule. In this setting, it is Congress, and not the courts, that should cause such a dramatic change to the meaning and application of the statute. See *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816) ("[t]he time, the process, and the manner [of removal], must be subject to [Congress'] absolute legislative control"). It is

critically important for this Court to preserve congressional primacy at this important junction of federal jurisdiction and federal civil procedure, particularly when core principles of federalism hang in the balance.

Finally, the established objective test for fraudulent joinder has the virtues of simplicity and objectivity. It assesses whether the plaintiff could establish a claim against the in-state defendant, and uses that inquiry as a proxy for a finding of improper joinder. Under the common defense rule, courts will have to determine the defenses of all defendants as against the plaintiffs and assess the merits of those defenses. This is complex, undesirable, and inefficient. It is also improper; a court assessing its own jurisdiction should not do so by deciding the merits and, as noted, the state court on remand will be confronted with a federal court's non-binding merits determination.

"Federal courts should not sanction devices intended to prevent the removal to a Federal court where one has that right." *Wecker*, 204 U.S. at 186. The common defense rule is such a device, allowing plaintiffs without a meritorious claim to keep an in-state defendant in a case and avoid removal so that its meritless claims can be decided in a hospitable state court. Only clarification by this Court can clean up the "unnecessarily created . . . mess in . . . removal jurisprudence." App. 26a (Smith, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-60782

KELLI SMALLWOOD,
Plaintiff-Appellant,

v.

ILLINOIS CENTRAL RAILROAD COMPANY;
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Defendants-Appellees.

Sept. 10, 2004

Appeal from the United States District Court for the Southern District of Mississippi.

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO and PICKERING, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Today we decide a narrow but not unimportant question regarding diversity jurisdiction in federal courts and the application of the doctrine of "improper joinder."[4] This is the first time this Court en banc has addressed the issue of

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[4] We adopt the term "improper joinder" as being more consistent with the statutory language than the term "fraudulent joinder," which has been used in the past. Although there is no substantive difference between the two terms, "improper joinder" is preferred.

improper joinder, although a number of panels of this Court have previously addressed it. We hold that, when a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant. In such a situation, the entire suit must be remanded to state court. In this case, it is undisputed that the district court's decision that Smallwood's claims against the in-state defendant were preempted effectively decided the entire case. On these facts, we conclude that the district court erred in deciding the merits of the proffered defense of preemption and in not remanding the case to the state court from which it was removed.

I

Kelli Smallwood is a Mississippi resident who was injured when a train struck her car at a railroad crossing in Florence, Mississippi. The train was operated by Illinois Central, an Illinois corporation, and the railroad crossing was controlled by an agency of the Mississippi state government, the Mississippi Department of Transportation ("MDOT"). At the time of the accident, the crossing did not have automatic gates; it was equipped only with warning lights, which had been installed using federal funds. After the accident, Smallwood filed suit in Mississippi state court against both Illinois Central and MDOT, raising claims of negligence. She alleged, in particular, that MDOT negligently failed to install gates at the crossing despite its knowledge that the crossing was unreasonably dangerous and extraordinarily hazardous.

Illinois Central removed the case to federal court. Illinois Central maintained that Smallwood's claims against MDOT were preempted by the Federal Railroad Safety Act

("FRSA").[5] Reasoning that the preemption defense barred Smallwood's claims against MDOT, Illinois Central argued that Smallwood had improperly joined MDOT because, under the FRSA, there was no reasonable possibility of recovery against MDOT.

The district court accepted Illinois Central's argument, dismissed MDOT from the case, and denied Smallwood's motion to remand. Applying the "law of the case," the district court then granted summary judgment for Illinois Central on the basis that Smallwood's claim against the railroad was equally preempted. The railroad won its case when it persuaded the district court that the claims against the in-state defendant, MDOT, were preempted.[6]

A panel of this court concluded that Illinois Central had not carried its burden of demonstrating that the joinder of MDOT was fraudulent, reversed the district court's dismissal of the case on its merits, and ordered the case remanded to state court. We voted to rehear the case en banc.

II

The starting point for analyzing claims of improper joinder must be the statutes authorizing removal to federal court of cases filed in state court. The federal removal statute, 28

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[5] The Federal Railroad Safety Act prohibits states from enforcing state laws when the Secretary of Transportation has adopted regulations covering the same subject. *See* 49 U.S.C. §§ 20101-20153.

[6] Smallwood raised two closely related claims against MDOT: that MDOT negligently failed to install gates and that its delay in installing gates was negligent. The district court rejected both of these claims on the basis of preemption, concluding that the FRSA preempted all of Smallwood's claims against MDOT. *See Smallwood v. Illinois Central RR Co.*, No. 3:01-cv-561BN (S.D.Miss. Aug. 14, 2002) (Opinion and Order); *see also Smallwood v. Illinois Central R.R. Co.*, 203 F. Supp. 2d 686 (S.D. Miss.2002). At oral argument, Illinois Central conceded that resolution of its preemption defense required dismissal of Smallwood's case in its entirety.

U.S.C. § 1441(a), allows for the removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Subsection (b) specifies that suits arising under federal law are removable without regard to the citizenship of the parties; all other suits are removable "only if none of the parties in interest *properly* joined and served as defendants is a citizen of the State in which such action is brought."[7] To remove a case based on diversity, the diverse defendant must demonstrate that all of the prerequisites of diversity jurisdiction contained in 28 U.S.C. § 1332 are satisfied. Relatedly, a district court is prohibited by statute from exercising jurisdiction over a suit in which any party, by assignment or otherwise, has been *improperly* or *collusively* joined to manufacture federal diversity jurisdiction.[8] As Professor Wright has noted:

> "[T]he Federal courts should not sanction devices intended to prevent the removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."[9]

The doctrine of improper joinder rests on these statutory underpinnings, which entitle a defendant to remove to a federal forum unless an in-state defendant has been "properly joined." Since the purpose of the improper joinder inquiry is to determine whether or not the in-state defendant was

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[7] 28 U.S.C. § 1441(b) (emphasis added).

[8] 28 U.S.C. § 1359. Section 1359 reads in full: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

[9] 14 Charles Alan Wright et al., Federal Practice and Procedure, § 3641, at 173 (3d ed.1998) (alteration in original) (quoting *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186, 27 S.Ct. 184, 51 L.Ed. 430 (1907)).

properly joined, the focus of the inquiry must be on the joinder, not the merits of the plaintiff's case.

Given this focus, we have recognized two ways to establish improper joinder: "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court."[10] Only the second way is before us today, and we explained in *Travis v. Irby*[11] that the test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant. To reduce possible confusion, we adopt this phrasing of the required proof and reject all others, whether the others appear to describe the same standard or not.[12]

There has also been some uncertainty over the proper means for predicting whether a plaintiff has a reasonable basis of recovery under state law. A court may resolve the issue in one of two ways. The court may conduct a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant.[13] Ordinarily, if a plaintiff can survive a Rule 12(b)(6)

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[10] *Travis v. Irby*, 326 F.3d 644, 646-47 (5th Cir.2003).

[11] *Id.* at 648.

[12] A "mere theoretical possibility of recovery under local law" will not preclude a finding of improper joinder. *Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n. 4. (5th Cir.2000).

[13] *See McKee v. Kansas City S. Ry. Co.*, 358 F.3d 329, 334 (5th Cir.2004); *see also Parks v. New York Times, Co.*, 308 F.2d 474, 478 (5th Cir.1962) (explaining that "there can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition to remand is heard").

challenge, there is no improper joinder. That said, there are cases, hopefully few in number, in which a plaintiff has stated a claim, but has misstated or omitted discrete facts that would determine the propriety of joinder. In such cases, the district court may, in its discretion, pierce the pleadings and conduct a summary inquiry.[14]

While the decision regarding the procedure necessary in a given case must lie within the discretion of the trial court, we caution that a summary inquiry is appropriate only to identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant.[15] In this inquiry the motive or purpose of the joinder of in-state defendants is not relevant. We emphasize that any piercing of the pleadings should not entail substantial hearings. Discovery by the parties should not be allowed except on a tight judicial tether, sharply tailored to the question at hand, and only after a showing of its necessity. Attempting to proceed beyond this summary process carries a heavy risk of moving the court beyond jurisdiction and into a resolution of the merits, as distinguished from an analysis of the court's diversity jurisdiction by a simple and quick exposure of the chances of the claim against the in-state defendant alleged to be improperly joined. Indeed, the inability to make the requisite decision in a summary manner itself points to an inability of the removing party to carry its burden.

III

Illinois Central argues that the district court's finding of improper joinder was appropriate because Smallwood's claims against MDOT were preempted by federal law.

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[14] *Badon*, 224 F.3d at 389 n. 10.

[15] For example, the in-state doctor defendant did not treat the plaintiff patient, the in-state pharmacist defendant did not fill a prescription for the plaintiff patient, a party's residence was not as alleged, or any other fact that easily can be disproved if not true. *See Irby*, 326 F.3d at 648-49.

Illinois Central urges, moreover, that it is irrelevant that the FRSA equally bars claims against it.

Facing the question for the first time in an en banc proceeding, we reject the railroad's contention. To justify removal on improper joinder grounds, Illinois Central was required to prove that the joinder of MDOT was improper. Illinois Central, however, brought no contention going to the propriety of the joinder. Rather, the basis of its contention that Smallwood could not recover went, in fact, to the entire case, although it was first directed to Smallwood's claims against MDOT. Then, with jurisdiction secured, and with all the force of the "law of the case," this same preemption was directed to the merits of Smallwood's claims against the railroad.

A claim of improper joinder by definition is directed toward the joinder of the in-state party, a simple but easily obscured concept. The party seeking removal bears a heavy burden of proving that the joinder of the in-state party was improper.[16] Nevertheless, when, on a motion to remand, a showing that compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no improper joinder; there is only a lawsuit lacking in merit. In such cases, it makes little sense to single out the in-state defendants as "sham" defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such—an allegation that, as phrased by the Supreme Court in *Chesapeake & O.R. Co. v. Cockrell*, "the plaintiff's case [is] ill founded as to all the defendants."[17] In reaching this

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[16] *See, e.g., Griggs v. State Farm Lloyds*, 181 F.3d 694, 701 (5th Cir.1999).

[17] 232 U.S. 146, 153, 34 S.Ct. 278, 58 L.Ed. 544 (1914).

conclusion, we are applying our traditional improper joinder analysis.

In *Cockrell*, the Supreme Court reviewed an effort by a railroad to remove a case to federal court on improper joinder grounds. The railroad argued that the plaintiff's negligence charges against the defendants were "each and all 'false and untrue'" and that the in-state defendants were added simply to defeat diversity.[18] Emphasizing that "the showing must be such as compels the conclusion that the joinder is without right and made in bad faith," the Court rejected the railroad's argument.[19] The Court reasoned that although the plaintiff's petition "may have disclosed an absence of good faith on the part of the plaintiff in bringing the action at all, . . . it did not show a fraudulent joinder of the engineer and fireman."[20] Since "no negligent act or omission personal to the railway company was charged," the improper joinder allegations directed at the employees "manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants."[21]

The Supreme Court thus made clear that the burden on the removing party is to prove that the joinder of the in-state parties was improper—that is, to show that sham defendants were added to defeat jurisdiction. A showing that the plaintiff's case is barred as to all defendants is not sufficient. When the only proffered justification for improper joinder is that there is no reasonable basis for predicting recovery against the in-state defendant, and that showing is equally dispositive of all defendants rather than to the in-state defendants alone, the requisite showing has not been made.

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[18] *Id.* at 151, 34 S.Ct. 278.

[19] *Id.* at 152, 34 S.Ct. 278.

[20] *Id.* at 153, 34 S.Ct. 278.

[21] *Id.*

Our insistence that a removing defendant demonstrate that the joinder was improper does not impair a foreign defendant's right to remove. "[T]he Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals."[22] In every case where a diverse defendant proves that the plaintiff's decision to join an in-state party is improper, the diverse defendant gains access to the federal courts. If, however, the foreign defendant fails to prove the joinder improper, then diversity is not complete, the diverse defendant is not entitled to remove, and remand is mandated.

Illinois Central contends, nonetheless, that our decision contradicts prior holdings of this circuit which have allowed a finding of improper joinder based on defenses going to the merits of the plaintiff's case, rather than to the joinder.[23] Yet we are not pointed to any decision of this Court where the assertion was made and rejected. It was asserted here, and our decision today fits squarely within our improper joinder doctrine and finds strong support in the Supreme Court's decision in *Cockrell* and the decision of the Third Circuit in *Boyer v. Snap-On Tools Corp.*[24]

While we need not deploy the well-pleaded complaint rule, it is not unimportant that our application of the improper joinder doctrine here disallows circumvention of the well-pleaded complaint rule. The railroad could not remove on the basis of federal question jurisdiction because the only federal question appeared as a defense. Nonetheless, Illinois Central

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[22] *Alabama Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 218, 26 S.Ct. 161, 50 L.Ed. 441 (1906).

[23] This argument was not presented to the able district judge. Going as it does to our subject-matter jurisdiction, we must decide it.

[24] 913 F.2d 108 (3d Cir.1990); *see also In re New England Mutual Life Ins. Co. Sales Practices Litig.*, 324 F.Supp.2d 288 (D.Mass.2004). *But cf. Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1320 (9th Cir.1998).

did just that: it removed on the basis of a defense of federal conflict preemption, urged as the bar to a reasonable basis for predicting recovery against MDOT, the in-state defendant. The appropriate application of the doctrine of improper joinder to this extent leaves intact the well-pleaded complaint doctrine with all its intended reach.

IV

It is urged that this application of the improper joinder doctrine undermines the purpose of diversity jurisdiction, which is to protect out-of-state defendants from local bias, the proverbial "home cooking." But our holding today is narrow. It applies only in that limited range of cases where the allegation of improper joinder rests only on a showing that there is no reasonable basis for predicting that state law would allow recovery against the in-state defendant and that showing is equally dispositive of all defendants.

The doctrine of improper joinder implements our duty to not allow manipulation of our jurisdiction. We are not persuaded that we can or should—as we are now urged to do—hold that *Strawbridge v. Curtiss*[25] does not apply to suits wholly lacking "merit," at least as seen by a federal court. That is not a rule of joinder, but a recrafting of *Strawbridge*. Until Congress changes our jurisdiction and allows us to hear cases based on something less than complete diversity, we cannot act. And make no mistake, whether to confer diversity jurisdiction in the absence of complete diversity is a quintessential political decision belonging to Congress, as congressional efforts to respond to abuses in state court class action litigation by allowing their removal on minimal diversity have so recently reminded us.

It is no accident that the first Congress conferred removal jurisdiction, accommodating competing political interests. Removal remains a centerpiece of our federalism. The cry of

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[25] 7 U.S. (3 Cranch.) 267, 2 L.Ed. 435 (1806).

out-of-state interests seeking to escape local courts and local plaintiffs seeking to avoid more distant justice is in fact an old and recurring song. It is a living dynamic, not an historic relic. To the point, our insistence that diversity removal, powerful as it is, remain within its congressionally marked traces is demanded by principles of comity and federalism—that a state court is to be trusted to handle the suit unless the suit satisfies the removal requirements.

It is argued that our holding undermines judicial economy by forcing a federal district court to remand a meritless case to state court rather than dismiss it outright. This argument, however, misconstrues the inquiry on removal. When a defendant removes a case to federal court on a claim of improper joinder, the district court's first inquiry is whether the removing party has carried its heavy burden of proving that the joinder was improper. Indeed, until the removing party does so, the court does not have the authority to do more; it lacks the jurisdiction to dismiss the case on its merits. It must remand to the state court.

Illinois Central seeks broader license to escape from state court, but we are not authorized to grant such a request, as compelling as it may be. It is the province of Congress to modify diversity jurisdiction.

V

The judgment of the district court is VACATED and the case is REMANDED to the district court with instructions to remand for want of jurisdiction to the state court from which it was removed.

E. GRADY JOLLY, Circuit Judge, with whom EDITH H. JONES, JERRY E. SMITH, RHESA HAWKINS BARKSDALE, EMILIO M. GARZA, EDITH BROWN CLEMENT and PRADO, Circuit Judges, join, dissenting:

I respectfully dissent from the majority's strange compulsion to amend the traditional rules of fraudulent joinder based on a seldom cited 1914 fact-specific case.[1] This is all the more strange in the light of the admonition we sounded recently: "[F]or the simple truth that we stand on the shoulders of those before us, if for no other reason, we must be hesitant when we act on recent flashes of 'new' insight to the fundamentals of governance". *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 227 (5th Cir.1998) (en banc), *rev'd*, 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (Higginbotham, J., dissenting). In my view, the majority, in accepting the plaintiff's briefing and "new insights", misreads the Supreme Court decision, disregards established precedent, designs a troublesome and unnecessary "common-defense" rule to amend a long established and fairer rule, offers meaningless reasoning to support its decision and creates confusion for the district courts—all for no other reason, as far as I can determine, than the satisfaction in finding a "buried treasure" obscured from our judicial predecessors for almost a century.[2]

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[1] It is also odd that the majority has jettisoned the term "fraudulent joinder", used by all of our cases for five decades and by the treatises, for the term "improper" joinder. Apparently the majority has concluded that it better serves its new way of looking at an established concept. We note, however, that "fraudulent joinder" was the term used by the Supreme Court in *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544 (1914), which happens to be the source of authority for the majority's new rule.

[2] In fairness to the district court and to the defendants, it should be noted that "common defense" argument was never raised until new attorneys entered the case on appeal. Thus, the defendants were deprived of developing any arguments below to counter the "common defense rule"

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Up until today, our precedent has been rooted, established and clear, having evolved through the writings of solid and respected judges over many years. It asks a simple question and, eschewing personal motives of the plaintiff, applies an objective test to produce a fair answer: When a diverse defendant removes to federal court on grounds of fraudulent joinder we only ask, as the majority opinion acknowledges:

> [W]hether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.

Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573, Maj. Op. at 573 (5th Cir.2004) (en banc) (*Smallwood III*). Our inquiry is designed to determine the single overarching question of whether the in-state defendant was joined "solely to deprive the federal courts of jurisdiction"; if our objective test determines that the plaintiff cannot recover, then the in-state defendant is deemed fraudulently joined and his "existence is disregarded for purposes of determining diversity". 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.14[2][c][iv][A] (3d ed.2004); *see also Smallwood v. Ill. Cent. R.R. Co.*, 342 F.3d 400, 407 (5th Cir.2003)(*Smallwood I*), *panel reh'g denied*, 352 F.3d 220 (*Smallwood II*), *reh'g en banc granted*, 355 F.3d 357 (stating that "the purpose of the fraudulent joinder doctrine . . . is to prevent a plaintiff from naming a nondiverse party as a defendant solely for the purposes of depriving the court of jurisdiction").

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and the district court has been denied the opportunity to express itself on the subject. Nevertheless, the majority proceeds straightforward to accept and adopt this untimely raised argument, contending that it is permitted to do so, because it is jurisdictional. See fn. 20 Maj. Op.

The subjective intent of the plaintiff is irrelevant; instead, our precedent, unequivocally and without exception, has evaluated claims of fraudulent joinder with a simple, well-understood, objective two-prong test[3]—that is, until today. *See Travis v. Irby*, 326 F.3d 644, 647 (5th Cir.2003); *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 461 (5th Cir.2003); *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 311-12 (5th Cir.2002); *Heritage Bank v. Redcom Lab., Inc.*, 250 F.3d 319, 323 (5th Cir.2001); *Griggs v. State Farm Lloyds*, 181 F.3d 694, 698-99 (5th Cir.1999); *Rodriguez v. Sabatino*, 120 F.3d 589, 591 (5th Cir.1997); *Burden v. Gen. Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir.1995); *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir.1995); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir.1989); *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir.1979); *Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir.1962).

Because we eschew a subjective test, our test does not seek to determine the "truth" of exactly why the nondiverse defendant was joined as a defendant in the lawsuit.[4] Instead, the many judges who have preceded us on this court have determined that this test produces a practical "truth": that is, it is reasonable and fair to assume that a lawyer, acting in accordance with the code of professional responsibility, will not sue someone against whom he has no reasonable basis of recovery, unless it is for an improper reason; on the other hand, when a lawyer sues someone against whom he has a reasonable basis of recovery, it is unlikely that the joinder

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[3] Under our two-prong test the diverse defendant must establish either "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir.2003). Only the second prong is before us today.

[4] Subjective tests could often require attempts to penetrate the mind of the plaintiff and turn removal hearings into lengthy proceedings.

was for an improper reason.[5] In short, it is always "improper"—professionally and ethically—to join any party to a suit if there is no basis of recovery, a point that apparently has no place in the reasoning of the majority.

Moreover, our established test is an efficient test because it focuses only on the joinder of the nondiverse defendant and does not require us to examine the case against the diverse defendant. The majority's "common-defense" rule, on the other hand, requires the district court to go one step further and examine the entirety of the case.

II

A

According to the majority, however, this traditional analysis is infected with error, long overlooked by scores of preceding judges but now revealed: The majority has declared that a New Legal Truth has been uncovered—The Common-Defense Theory. Although the panel's bold proclamation of the new discovery has been modulated by the en banc majority, and although the majority has narrowed the open-ended sweep of the panel, the unfortunate amendment to our traditional rule remains:

> When the nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against the in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant.

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[5] "Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and 'not interposed for any improper purpose.'" *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (quoting Fed.R.Civ.P. 11); *See also* Model Rules of Professional Conduct Rule 3.1 (2002) (stating that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous").

Smallwood III, 385 F.3d at 571, Maj. Op. at 571.[6] Under this rule, even if the diverse defendant completely satisfies our traditional test and demonstrates that the plaintiff has no reasonable possibility of establishing a cause of action against the in-state defendant, the traditional rule is abrogated, and the case is remanded, irrespective of the plaintiff's inability to recover in state court, if the diverse and nondiverse defendants happen to possess the same defense.

B

The majority's support for its creation of the common defense rule is the turn of the century fact-specific Supreme Court case, *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544 (1914). The pertinent language—cherry-picked and shorn of context—upon which the majority relies as compelling a common-defense rule, states:

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[6] Notwithstanding the objections we have with respect to the majority opinion, we commend the majority's efforts to define more precisely the rule's narrow application. The majority has restricted the rule to apply only when the in-state defendant's defense is identical to the one asserted by the diverse defendant, which defense automatically and simultaneously disposes of the plaintiff's case against the diverse defendant as well. *See Smallwood III*, 385 F.3d at 571, Maj. Op. at 571 (stating that the defense must "equally dispose of" the diverse defendant); *id.* at 574-75, Maj. Op. at 574-75 (stating that the defense must "necessarily compel[]" the same result as to the diverse defendant); *id.* at 575, Maj. Op. at 575 (stating that the defense must be "equally dispositive of all defendants").

A somewhat more complicated application of the "common defense" rule occurs when there are two or more defenses available to the non-diverse defendant, only one of which is "common" to the diverse defendant. In such a case, the federal court may nevertheless have jurisdiction if, on a motion to remand by the plaintiff, the removing party asserts and proves only the non-common defense. Because the defense at issue would not be "common," the traditional rule (no reasonable possibility of recovery in the state court against the instate defendant) would apply—not the "common defense" rule adopted here by the majority.

> As no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants. Plainly, this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them. As they admittedly were in charge of the movement of the train, and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky, to insist upon their presence as real defendants as upon that of the railway company.

Cockrell, 232 U.S. at 153, 34 S.Ct. 278. As discussed below, however, the correct reading of *Cockrell* does not justify, much less compel the creation of the "common-defense" rule.

Since *Cockrell* was decided in 1914, the only circuit court decision that, previous to today, has interpreted it as proclaiming a "common-defense" exception to the fraudulent joinder rule is the Third Circuit's opinion in *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108 (3d Cir.1990).[7] Equally revealing of the novelty of the majority's position is that neither WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE NOR MOORE'S FEDERAL PRACTICE—the two most authoritative treatises on federal practice—cites

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[7] In *Boyer*, the Third Circuit relied on the same passage from *Cockrell* as mandating a common defense rule. *Boyer*, 913 F.2d 108. In fact, in *Smallwood I*, the panel relied heavily on *Boyer*'s interpretation of *Cockrell* and adopted verbatim *Boyer's* version of the "common defense" rule. *Smallwood I*, 342 F.3d at 405.

Cockrell as relating to such a theory as "common-defense" or, for that matter, even intimates that such a rule exists.[8]

C

I turn now to address the majority's reliance on *Cockrell*. In *Cockrell* the plaintiff sued the Railroad and the in-state engineer and fireman who operated the train that caused the death of the intestate. The plaintiff alleged that, although the negligence was that of the in-state engineer and fireman in the manner that they operated the train, the railroad—which committed no independent act of negligence—was nevertheless liable for the negligent conduct of its employees. In short, the entire suit was solely *founded* (or "ill-founded") on the conduct of the in-state defendants; *no argument* could be made, as the Court put it, that the two in-state defendants were joined to a suit in which they did not belong. Indeed, but for their conduct the railroad would not have been in the suit; the in-state defendants could not possibly have been fraudulently joined because their conduct was the *only* actionable conduct in the case; there was in essence but one case and it was against the joined defendants themselves.

With respect to the grounds of fraudulent joinder of the two employees, the Railroad's *only* basis was that the plaintiff's allegations against these two in-state defendants were "false and untrue". *See Cockrell*, 232 U.S. at 153, 34 S.Ct. 278. To

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[8] FEDERAL PRACTICE AND PROCEDURE mentions *Cockrell* only for the propositions that (1) "the burden on the party seeking removal on the basis of fraudulent joinder is a heavy one," (14B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Jurisdiction 3d § 3723 (3d ed.1998)), (2) "[r]esort to the allegations in the notice of removal also may be necessary to show that one or more parties have been fraudulently joined to defeat removal," (14C Federal Practice and Procedure: Jurisdiction 3d § 3734 (3d ed.1998)), and (3) "[a]llegations in the notice may be used to show that parties have been fraudulently joined to defeat removal." 20 Charles Alan Wright & Mary Kay Kane, Federal Practice and Procedure: Federal Practice Deskbook § 42 (2002). Moore's Federal Practice, on the other hand, does not appear to cite *Cockrell* at all.

be sure, the Railroad's claim of fraudulent joinder would have required that a trial on the merits be conducted in a removal proceeding.

That the majority misreads *Cockrell* as calling for modification of our traditional rules of fraudulent joinder is demonstrated by how neatly the traditional rules decide the case for fraudulent joinder presented in *Cockrell*: We look at the complaint and first conclude that the complaint clearly states a claim against the fireman and the engineer for their negligent conduct, a claim that has a possibility of prevailing under state law; we next look at the railroad's claim of fraudulent joinder, that is, that the negligence claims were "false and untrue"; we then apply our rule that disputed factual merits will not be tried in removal proceedings; and we would have remanded. This exercise demonstrates that the majority has vastly overstated the implications of *Cockrell*. In fact, it is only by seizing language taken out of context and ignoring the sum of this case in all of its parts—factual and legal—that the majority creates its misguided amendment to our traditional rule.

Still further, however, in virtually all respects the instant case is distinguishable from *Cockrell*. First, there is no issue of vicarious liability here and consequently the "entirety" of the case against Illinois Central is not premised on the liability of MDOT. Unlike *Cockrell*, Smallwood seeks to hold Illinois Central liable for its own act of negligence—its negligent delay in installing safety devices. *Compare with Cockrell*, 232 U.S. at 153, 34 S.Ct. 278 (stating that "no negligent act or omission personal to the railway company was charged"). Consequently, unlike the Railroad in *Cockrell* whose liability was totally dependent upon the liability of the joined defendants (its employees), Illinois Central's liability was not predicated on the negligence of MDOT; instead, its liability was independent of MDOT's liability. *Compare with Cockrell* (stating that the railroad's liability "was, in effect, predicated upon the negligence of the [employees]"). *Id.*

Therefore, the showing of conflict preemption in this case, unlike *Cockrell*, does not go the *merits* of the action in its entirety, that is, the defense is not a traverse of the allegations of the entire complaint, as in *Cockrell*, but only indicates that, as to MDOT, Smallwood's claims are procedurally barred; stated differently MDOT's defense does not attack the facts upon which the plaintiff's case against Illinois Central is founded nor automatically absolve Illinois Central of its own alleged negligence. *Compare with Cockrell*, 232 U.S. at 153, 34 S.Ct. 278 (stating that "the showing manifestly went to the merits of the action as an entirety, and not to the joinder, that is to say, it indicated that the plaintiff's case was *ill founded* as to all defendants" (emphasis added)).

In sum, it is only through a strained application based on a serious misreading that the majority inflates the significance and relevance of *Cockrell*, a case that has lain basically dormant for all of its 90-year life.

III

Not only does the majority's misreading and misapplication of *Cockrell* betray the weakness of its position, the majority fails to come up with any compelling reasons that might otherwise support its misadventure.

It argues that its theory is justified, because the focus in fraudulent joinder cases should be on the joinder of the non-diverse defendant—*not* on the merits of the case. This "focus" argument is a strawman. Of course the focus should be on the joinder, but on the joinder as a whole. Beyond uttering the platitudinous axiom that the focus should be on the joinder, the majority fails to offer any explanation of why the viability of the cause of action against the joined defendant is not part of that focus; indeed, only a few lines later, the majority states that the joinder inquiry is whether the plaintiff can establish a cause of action against the joined party. But, as with other inconsistent and contradictory

statements in the opinion, the common-defense rule duels with this professed statement of the governing rule.

The majority may be unwilling to face it, but the plain and undeniable fact is that *only* the traditional test focuses exclusively on the joinder; the common-defense theory *requires* that the court look beyond the joinder of the nondiverse defendant to the entirety of the case and determine the defenses of the diverse defendant as well. If the majority were serious in trumpeting a test that focuses on the joinder, and not the entire case, it would adhere to the traditional test.

The majority seems to forget that the overarching purpose of improper joinder inquiry is to determine if the defendant has been joined solely to defeat diversity. *See* JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.14[2][c] [iv][A] (3d ed.2004).[9] The weakness of the majority's argument is that it fails to demonstrate how the common-defense rule serves the purpose of the improper joinder inquiry—that is, to determine whether the defendant has been joined solely to defeat diversity—any better than, or as well as, the traditional test does. Indeed, as we have demonstrated earlier, the traditional test produces a "practical truth", where the common defense theory does not even purport to do so.

The majority argues that even though Illinois Central showed there could be no recovery against the joined defendant, it failed to prove that the joinder of MDOT was improper and that Illinois Central "brought *no contention*

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[9] The panel opinion expressly agreed with this statement of purpose, as indeed does the unanimous precedent of our circuit. *See Smallwood I*, 342 F.3d at 407. The majority, however, finds this statement of purpose inconvenient to the arguments it is now making and in a circular fashion says that "the purpose of the improper joinder inquiry is to determine whether or not the in-state defendant was properly joined". *Smallwood III*, 385 F.3d at 573, Maj. Op. at 573. It cites no authority for its circular statement of purpose.

going to the propriety of the joinder." *Smallwood III*, 385 F.3d at 574, Maj. Op. at 574 (emphasis added). It is difficult to understand how the majority can make such a serious misstatement, unless it is somehow contending that Illinois Central had no right to rely upon 40 years of consistent precedent. Illinois Central relied upon our well-established precedent and demonstrated to the satisfaction of the district court—a result which the majority does not challenge—that the plaintiff had no reasonable possibility of recovering against MDOT; it was clearly improper to sue (and thus "join") MDOT when the plaintiff had no hope of recovery against MDOT. Furthermore, even in the light of *Cockrell*, the defense of MDOT did not go to the merits of the entire case that the plaintiff had alleged against Illinois Central; only a procedural defense was raised to bar Smallwood's claims against MDOT. Thus, it is a serious misstatement to suggest that Illinois Central "brought no contention going to the propriety of the joinder" when Illinois Central demonstrated that the plaintiff's claims against MDOT were barred; this showing meant, under the law existing until today, that MDOT was joined solely to defeat diversity jurisdiction. This argument goes directly to the propriety of the joinder by any standard and it is incorrect for the majority to assert otherwise.

In an attempt to provide some logic to its argument, the majority argues that because MDOT's successful defense also requires the dismissal of the entire case, the joinder of MDOT is not improper because the removed case is only a meritless case, not a fraudulently joined case. The majority connects no further dots to this argument. Left hanging, as its postulate is, it follows that the majority argues that the lack of merit of a case determines removability—which it surely does not. Seizing on a dichotomy between removable and meritless cases, the majority simply has not sorted out the confusion of its contention: it argues that when both defendants possess the same complete defense the claim is meritless and the case

is non-removable; yet, it surely does not contend that the meritless case is non-removable when the respective defenses of the diverse and nondiverse defendants are different, and result in the dismissal of the entire case. Thus, it is clear that the attempted rationale of equating a completely meritless case with non-removability is meritless in itself.

The most baseless argument of the majority is that it is only "applying our traditional improper joinder analysis." *Smallwood III*, 385 F.3d at 574, Maj. Op. at 574. This statement represents a retreat into major denial of what it has so plainly done. Indeed, it is incomprehensible how the majority would expect this statement to be taken seriously. We have previously string-cited the numerous cases applying our traditional fraudulent joinder analysis, none of which—I repeat, none of which—has any element of the common-defense rule that the majority tattoos on our traditional analysis. Even the majority acknowledges that under our traditional analysis:

> the test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.

Smallwood III, 385 F.3d at 573, Maj. Op. at 573. Thus, there is no question but that, under the majority's own test, MDOT was fraudulently joined since the majority does not deny that there is no possibility of recovering against MDOT. Because it asserts that it is only following our traditional test, one would expect the majority to follow its own pronouncement of the traditional analysis. But no; notwithstanding the unequivocal words the majority expresses in one part of the opinion, the majority then contradicts itself and shapes a new rule: even though there is no reasonable basis for predicting that state law would allow recovery against MDOT, it is nevertheless *properly* joined and the case is not removable,

because its defense disposes of the entire case and renders it a "meritless" case, not a "fraudulently joined" case. This clearly is a departure from the traditional test for fraudulent joinder and the majority's denial of what it has done demonstrates its ultimate lack of confidence in its novel theory.

In sum, the arguments that the majority makes to shore up its misreading of *Cockrell* deflate under any careful examination and make unavoidable the conclusion that the majority has been beguiled by Smallwood's dare to this court to be modern—1914 style.[10]

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[10] We do note that the majority opinion contains what we consider to be several irrelevancies, which we suppose are inserted as rhetoric to bolster its effort to sell the "common-defense" rule: to-wit, the reference to *Strawbridge v. Curtiss* and the well-pleaded complaint rule among others, which have nothing to do with the case.

Of more importance, the majority, with no call to do so, addresses procedure and discovery issues that arise in remand proceedings. This writing is fairly unremarkable except that it appears to be written to underscore one side of our precedent. It certainly has no precedential effect. These remarks are pure dicta because no one has made an issue of this subject at any point in these proceedings. It certainly has no relevance to deciding this case. The further insignificance of this writing is demonstrated by the majority's failure to cite any authority, notwithstanding the fact that we have a long list of precedents addressing the appropriateness of discovery in removal proceedings. *See Badon v. RJR Nabisco, Inc.*, 224 F.3d 382, 389, 393-94 (5th Cir.2000); *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 356-57 (5th Cir.1999); *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 & n. 18 (5th Cir.1995); *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 263 (5th Cir.1995); *Burchett v. Cargill, Inc.*, 48 F.3d 173, 175-76 (5th Cir.1995); *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815-16 (5th Cir.1993); *LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir.1992); *Carriere v. Sears Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir.1990); *Keating v. Shell Chemical Co.*, 610 F.2d 328, 333 (5th Cir.1980). It is this authority that has precedential value.

IV

With fullest respect, I dissent because the majority, for no sound legal reason that I can determine, has taken upon itself to amend our established rules for determining diversity jurisdiction, while admonishing that such amendments should be left to Congress. It has done so in strange ways. It has relied on a Supreme Court case that has been dormant to the world for close to a century and has no relation to the facts here. The majority acknowledges our traditional rule as controlling. It then amends the rule by adding a "but if" clause. It then denies that it has done what it has just done. It offers meaningless ad hoc arguments that skirmish with its earlier pronouncements. It then sounds alarms that *Strawbridge v. Curtiss* is under attack—a gratuitous and phantom irrelevancy to the matter before us. It decries a closet attack on the well-pleaded complaint rule that seems to be a decoy. All of this, and yet there is no explanation why our traditional rule does not work better to serve the purpose of the fraudulent joinder inquiry: To determine whether the in-state defendant was joined "solely to deprive the federal courts of jurisdiction."

Even though I am baffled why the majority would produce this aberrant writing, it is nevertheless with collegial respect that I dissent.[11]

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[11] Judge Clement's dissent is insightful and states a principle that is not only consistent with our traditional rule, but is the embodiment of that rule: In removal proceedings, it is not for the district courts to decide a contested and undecided legal issue when the court must choose between two arguments, each with plausible merit. In such a situation, it cannot be said that there is no reasonable possibility of recovery in state court. The joinder, therefore, is not improper, irrespective of what the district court may think is the correct answer. Yet, the majority ignores her writing, never addressing whether this case might be decided and remanded under Judge Clement's approach, which could render its common defense theory unnecessary for a remand of this case.

JERRY E. SMITH, Circuit Judge, with whom EDITH H. JONES and RHESA HAWKINS BARKSDALE, Circuit Judges, join, dissenting:

"Courts must be particularly circumspect in reconsidering decisions interpreting statutes." *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343, 1353 (5th Cir.1987) (en banc) (Higginbotham, J., concurring), *vacated*, 492 U.S. 901, 109 S.Ct. 3207, 106 L.Ed.2d 558 (1989). "As an inferior court we must not allow our version of a 'correct' result to deceive us into semantic games of reformulation and hair splitting in order to escape the force of a fairly resolved issue." *Id.* at 1352 (Higginbotham, J., concurring). Contrary to this well-established tenet of *stare decisis*, however, the majority, in an opinion by Judge Higginbotham that reflects lowest-common-denominator reasoning, has unnecessarily created a mess in this circuit's removal jurisprudence. Most significantly, in an offering worthy of the Oracle at Delphi, the majority, in an exercise of judicial activism, has made a quagmire out of what had been an orderly and fair process for determining fraudulent joinder.

Judge Smith's dissent raises credible issues that demonstrate the confusing jurisdictional and collateral estoppel possibilities that the majority opinion creates, and then refuses to address. For example, because the majority's explanation for distinguishing between the traditional rule and the common defense rule is that the entire case is a *meritless* case—not a fraudulently joined case—it would appear that it is necessary, under the common defense rule, to determine the merits of the common defense in order to determine if it is a "meritless case." And, although the common defense analysis may ultimately determine that the federal court has no jurisdiction to entertain the case, the federal court surely would have had jurisdiction to determine its own jurisdiction, and the finding of a meritless case would have been made when the federal court was acting within its jurisdiction. As such, the federal court decision may, on remand to the state court, constitute a binding finding in the state case. The majority would act more responsibly by confronting and attempting to resolve the confusion that arises from its aberrant and troublesome decision. Its silence is truly regrettable and will be costly to the administration of justice.

In so doing, and by dusting off a forgotten decision of the Supreme Court, the majority has introduced needless friction and conflict into the federal-state rubric for determining the proper forum for civil diversity actions. And finally, in a remarkable showing of euphemistic chutzpah, the majority has renamed "fraudulent joinder" as "improper joinder," upsetting decades of nomenclature without apparent reason. Agreeing with every word of Judge Jolly's compelling dissent, I add a few comments.

I.

A.

The majority insists that "the focus of the inquiry must be on the joinder, not the merits of the plaintiff's case." As Judge Jolly cogently shows, however, it is the majority's new-fangled common-defense theory that expands inquiry into the merits by, as Judge Jolly puts it, "*requir[ing]* that the court look beyond the joinder of the nondiverse defendant to the entirety of the case and determine the defenses of the diverse defendant as well."

The majority pretends that it avoids inquiry into the merits when making the determination of fraudulent-joinder-now-to-be-called-improper-joinder. The fatal flaw in this exercise is that under the majority's construction, it is impossible to decide fraudulent-joinder-now-to-be-called-improper-joinder without making decisions on the merits.

Because the district court has jurisdiction to decide its own jurisdiction, that court has not only the capacity but the duty, in deciding the issue of fraudulent-joinder-now-to-be-called-improper-joinder, to address any merits questions that are made necessary by the majority's scheme. The decision on any such merits issue then logically becomes a holding, because it is necessary to the result (i.e., remand) and therefore (again, logically) should be binding on the state court to which the action is returned.

If the majority were to respond (which it will not, *see infra*), it undoubtedly would counter that it is not deciding the merits at all—indeed, that it is prohibited from doing so, because, given that the ultimate result is that it is without jurisdiction over the merits, its power to decide is limited to determining its own jurisdiction. In the majority's words, "[a]ttempting to proceed beyond [a] summary process carries a heavy risk of moving the court beyond jurisdiction and into a resolution of the merits."

Overlooked in this reasoning is that it is at times not only desirable but necessary for a court to examine at least a portion of the merits as a precursor to deciding jurisdiction. "[A] federal court always has jurisdiction to determine its own jurisdiction. In order to make that determination, it was necessary for the [court of appeals] to address the merits." *United States v. Ruiz*, 536 U.S. 622, 628, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002).

B.

The problem with imposing a rule by which the district court must "address the merits" is that the state court that receives the remand will need to decide what to do with that decision. In the instant case, the majority blesses "a summary inquiry . . . to identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant." Where such preclusion is found, it "necessarily compels the same result for the nonresident defendant, [so] there is no improper joinder; there is only a lawsuit lacking in merit." In other words, as the majority further explains, "the allegation of improper joinder is actually an attack on the merits of plaintiff's case. . . ."

The majority makes no effort to examine the consequences of its own explanation. The majority imposes a process whereby the federal district court is required to decide merits issues, even to the point of declaring that the lawsuit is entirely "lacking in merit." One would think that once a court

of competent jurisdiction has made such a "decision" that a case is wholly without merit, that case is at an end, and no other court—state or federal—may reexamine it.

What, then, under the majority's formulation, is the state court supposed to do on remand? One option would be for the state court to dismiss the case ministerially and without making further inquiry into the correctness of the federal district court's decision.[1] But that would be a process of unnecessary formalism and, in any event, is not what the majority apparently contemplates.

The majority gives no hint that the state court will be in any way bound by the federal district court's pronouncement that, *as a matter of merits and substance*, the lawsuit is wholly lacking in merit. Very much to the contrary, under today's logic the state court will be free to disagree, to resurrect the case, and ultimately to award the plaintiff relief against the in-state and out-of-state defendants as well. In other words, the state court will be free to ignore whatever merits conclusions the federal court has reached.

II.

The majority thus unnecessarily and unwittingly creates friction between state and federal jurisdictions. The majority's new paradigm eviscerates what the majority venerates as the "principles of comity and federalism." By thinly-veiled implication, the majority declares that the federal court is incompetent to make a binding pronouncement on the merits issues as to which the majority insists that same federal court is *obliged* to reach non-binding conclusions.

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[1] *See, e.g., FDIC v. Meyerland Co.* (*In re Meyerland Co.*), 960 F.2d 512, 520 (5th Cir.1992) (en banc) (requiring court that receives an action to take it as it finds it and enter prescribed judgment without making independent evaluation of the merits).

This contrivance is at war with the collegial state-federal relations that the majority pretends to honor. The majority's novel plan invites parties to take one tack in federal court and another once remand has been achieved. The majority's reasoning invites disparate interpretations of the same issues of law by state and federal forums. It promotes manipulation and complication of a process that, until now, has been stable, predictable, and fair.

III.

By redesignating "fraudulent joinder" as "improper joinder," the majority has shown its agility in innovative nomenclature. What should the majority call its new breed of merits decisions that are not binding holdings? Perhaps they are "musings," or "asides" or "ruminations," or "advisory opinions" or *dicta*, or even "preliminary predictions"—something less than a holding but more than an idle thought. They are, in any event, a breed apart. They are rulings the majority says are necessary to the decision on fraudulent-joinder-now-to-be-called-improper-joinder, but, once these rulings or ruminations are issued, they disappear into the ether, after remand, as if they had never even been expressed. They are simultaneously indispensable and expendable, at once both necessary and superfluous.

IV.

The majority's newly-concocted "common-defense" rule, raised by plaintiff for the first time on appeal, will cause resourceful defense counsel, in the vigorous defense of their clients' interests, to alter the way in which they plead defenses. The filing of defenses will be timed not in a way designed to ensure "the just, speedy, and inexpensive determination of [removed] action[s]," Fed.R.Civ.P. 1, but instead in such a manner as to avoid imposition of the majority's common-defense mechanism. Defenses will be described and fashioned so that they cannot be deemed to apply to diverse and non-diverse defendants alike. Such

manipulation and contrivance, exacerbating the prospect of varying state-federal adjudications I have described above, can only undermine respect for the courts.

V.

Entirely overlooked in the majority's analysis is any concern for "the traditional values of *stare decisis*." *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir.1987) (en banc) (Higginbotham, J., concurring), *vacated*, 492 U.S. 901, 109 S.Ct. 3207, 106 L.Ed.2d 558 (1989). This principle is especially important where, as here, we are interpreting statutes instead of the Constitution. "Courts must be particularly circumspect in reconsidering decisions interpreting statutes." *Id.* at 1353 (Higginbotham, J., concurring). "[I]f only a question of statutory construction were involved, we would not be prepared to abandon a doctrine so widely applied throughout nearly a century." *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (Brandeis, J.).

"[A]ny detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained." *Vasquez v. Hillery*, 474 U.S. 254, 266, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (internal quotation and citation omitted). Here, the majority offers absolutely no reason why there is a problem, much less one that so badly needs to be fixed that it can trample *stare decisis* to achieve a questionable and bizarre result.

We should not break with a well-established rule of law unless it is "outdated, ill-founded, unworkable, or otherwise vulnerable to serious reconsideration." *Id.* "[T]here is a point at which the orderly accommodations of law-making and law-interpreting demands that we resist reconsideration because Congress may well have acquiesced in prior statutory interpretations." *Bhandari*, 829 F.2d at 1352 (Higginbotham,

J., concurring). Here, there is not only no good reason to enact a change, there is no reason at all, except the majority's *ipse dixit*.

It would be bad enough that the majority effects a sea change in the heretofore orderly world of removal jurisprudence. It is worse still that the majority makes no attempt to offer compelling reason for its revolution. It appears, in fact, that the majority can identify no reason, for it provides no answer—not even a word—in response to the cogent points made by Judge Jolly in dissent, to Judge Clement's resourceful concurrence, or to the issues I have raised. The majority's silence harms the collegial judicial process by leaving the reader to wonder whether the majority has even examined the objections that have been raised or, instead, is intransigent because of fear of losing its majority status. It would be far better for the two sides to join issue, despite their differences, in the interest of frankly fleshing out these important questions. Perhaps the majority merely has no answer to the deficiencies in its reasoning that the dissents have identified.

VI.

In sum, the majority is wrong for many reasons, not the least of which is that its pronouncement that a "defense [that] disposes of the entire case and renders it a 'meritless case'" logically should, if true, completely end the litigation, not prolong it in another forum. The proper answer, instead, is that we can easily avoid the potential state-federal conflict, not to mention the inefficiency imposed by the majority's new scheme, which, as Judge Jolly notes, will require mini-trials that turn simple proceedings into ordeals.

As Judge Jolly lucidly explains, "the [majority's] common-defense theory requires that the court look beyond the joinder of the nondiverse defendant to the entirely of the case and determine the defenses of the diverse defendant as well. If the majority were serious in trumpeting a test that focuses on

the joinder, and not the entire case, it would adhere to the traditional test." That traditional test avoids all the pitfalls I have explained, and we are left with no explanation of why the majority is so determined to abandon it. Because our settled jurisprudence on fraudulent joinder should be left alone, I respectfully dissent.

EDITH BROWN CLEMENT, Circuit Judge, dissenting, concurring in judgment only:

For the reasons cited in Judge Jolly's dissent, I respectfully dissent from Part III of the majority opinion. *Cockrell* does not intimate the common-defense rule that the majority sets forth. Nevertheless, despite the majority's faulty common-defense rationale, the majority is correct in concluding that ICR does not prevail on its fraudulent-joinder claim. ICR fails to show that it is *un*reasonable to construe FRSA as *not* applying to Smallwood's state-law claim of negligence against MDOT. ICR attempts to prove fraudulent joinder by showing an "inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *See Travis v. Irby*, 326 F.3d 644, 647 (5th Cir.2003). ICR argues that Smallwood is unable to establish a cause of action against MDOT because under FRSA, the affirmative defense of preemption applies to Smallwood's claim of negligence in delaying installation of warning devices. To support its preemption claim, ICR cites decisions in other circuits that suggest that where federal funds were used to install railroad crossing devices, FRSA preempts claims of negligence in the delay of installation. *See Bock v. St. Louis Ry. Co.*, 181 F.3d 920, 923-24 (8th Cir.1999); *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir.1996).

Smallwood argues that FRSA does not preempt her negligence claim against MDOT. She first points out that this Circuit has not yet ruled on whether FRSA preempts claims of negligence in the delay of installation. Smallwood next

points out that in applying the preemption doctrine under FRSA, this Court has stated that it "follow[s] the Supreme Court in eschewing broad categories such as 'railroad safety,' focusing instead on the specific subject matter contained in the federal regulation." *See Frank v. Delta Airlines Inc.*, 314 F.3d 195, 200 (5th Cir.2002) (internal quotations omitted). This Court has further stated that "'FRSA preemption is even more disfavored than preemption generally.'" *United Transp. Union v. Foster*, 205 F.3d 851, 860 (5th Cir.2000) (quoting *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 515 (5th Cir.1999)). Against this backdrop of Fifth Circuit precedent, Smallwood observes that the portion of FRSA that ICR cites as preemptive does not actually set forth guidelines regarding the time within which warning devices must be installed.[1] Lastly, Smallwood directs this Court to a federal district court decision that completely supports her position, *Powers v. CSX Transportation Inc.*, 97 F.Supp.2d 1297 (S.D.Ala.2000). There, the federal district court held that FRSA does not preempt state-law claims of negligence in the delay of installing warning devices. *Id.* at 1305-09. The court opined that preemption of the state-law claim would be contrary to the purpose of FRSA, reasoning:

> [I]f [FRSA] were construed to preempt negligent delay claims, railroads could indefinitely delay installation of additional warning devices approved by [a federal agency] with—as in this case—catastrophic effects on the very people Congress intended to protect. . . . [T]he Court cannot fathom any set of circumstances under which such a result could be consonant with Congress' purpose to "promote safety . . . and to reduce railroad-related accidents."

Id. at 1305-06 (quoting 49 U.S.C. § 20101). According to Powers, FRSA does not substantially subsume the subject

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[1] FRSA does address a timeline for an accelerated project, but such a project is not at issue here. *See* 23 C.F.R. § 646.218.

matter of timely installation. *Id.* Smallwood thus cites persuasive legal authority, in an area of law that this Circuit has not yet decided, to support her argument that federal preemption does not apply.

In the context of fraudulent joinder, this Court has not opined how courts should construe a federal affirmative defense to a state-law claim where the federal law is not clearly defined. This Court has, however, addressed the standard for construing unclear state law. Beginning with *Bobby Jones Garden Apartments, Inc. v. Suleski*, 391 F.2d 172, 176 (5th Cir.1968), this Court stated the standard as follows:

> [T]he question is whether there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved. If that possibility exists, a good faith assertion of such an expectancy in a state court is not a sham, is not colorable and is not fraudulent in fact or in law.

Recently, in *Travis v. Irby*, this Court thoroughly discussed the issue and concluded that a defendant must demonstrate the absence of a "reasonable basis for predicting that the state law might impose liability on the facts involved. . . ." 326 F.3d 644, 647-48 (5th Cir.2003) (quoting *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir.2002)); *accord Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir.1999) ("[W]e must determine whether there is any reasonable basis for predicting that [the plaintiff] might be able to establish [the defendant's] liability on the pleaded claims in state court."). The principle underlying this Court's construction of uncertain state law is, in the words of the majority, to discover "whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant. . . ." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573, Maj. Op. at 573 (5th Cir.2004).

This principle—that a defendant must demonstrate that there is no possibility of recovery by the plaintiff—suggests that courts should construe an unclear federal affirmative defense to a state-law claim in the plaintiff's favor, just as the principle requires courts to construe state law in favor of the plaintiff. To prevail on a fraudulent-joinder claim, then, a defendant must show that no reasonable basis exists for construing a federal affirmative defense as not applying. By showing that the affirmative defense *must* apply, a defendant will have shown that the "joinder is without right and made in bad faith." *See Cockrell*, 232 U.S. at 152, 34 S.Ct. 278. In contrast, where the affirmative defense can reasonably be interpreted as not applying, the defendant has not shown that the joinder was made in bad faith. Thus, a joinder does not appear to be "made in bad faith" if there is at least a non-frivolous, reasonable basis for construing the federal affirmative defense so that it does not apply to the state-law cause of action.

This rule implies that where an issue of whether a federal affirmative defense applies is *res nova*, and there is a non-frivolous, reasonable basis for construing the federal affirmative defense as not applying, a defendant cannot show fraudulent joinder. Under those circumstances, the resolution of that *res nova* issue is improper. Although a federal court can decide such a *res nova* federal question when it is properly before the court, the court should refrain from deciding it in the fraudulent-joinder context if a reasonable, non-frivolous basis exists for interpreting the issue in favor of the plaintiff: the reasonable basis is sufficient to determine the ultimate jurisdictional question of fraudulent joinder.

Applying this principle to the instant case reveals that ICR must show that a non-frivolous, reasonable basis does not exist for construing FRSA as not preempting Smallwood's state-law claim of negligence in the delay of installation. As stated above, ICR attempts to satisfy this burden by citing persuasive authority from the Eighth and Tenth Circuits, *Bock*

and *Armijo*, which hold that FRSA preempts that claim. In the face of this authority, it is unquestionable that ICR has raised a strong argument for construing FRSA as applying. But the strength of ICR's argument falls short of showing that it is *un* reasonable to construe FRSA as *not* applying. Given that (1) this Court construes narrowly the doctrine of federal preemption (especially with respect to FRSA), (2) FRSA does not specify a time period for installing warning devices, and most importantly, (3) persuasive authority has held that FRSA does not preempt the same state-law claim, a non-frivolous, reasonable basis does exist for Smallwood's assertion that FRSA does not preempt her state-law claim.

It should be emphasized that this conclusion does *not* imply that FRSA does not preempt Smallwood's negligence claim. The fraudulent-joinder context of the preemption issue before this Court only requires that this Court determine whether Smallwood argued in bad faith that FRSA does not apply. Because a non-frivolous, reasonable basis exists supporting Smallwood's argument, the district court should not have reached that preemption issue to determine jurisdiction. ICR has not shown fraudulent joinder. Remand is appropriate.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-60782

KELLI SMALLWOOD,
Plaintiff-Appellant,

v.

ILLINOIS CENTRAL RAILROAD COMPANY;
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Defendants-Appellees.

Aug. 7, 2003

Before KING, Chief Judge, and HIGGINBOTHAM and STEWART, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

A locomotive operated by Illinois Central Railroad Company (Illinois Central) injured Kelli Smallwood when it struck the automobile in which she was traveling. The accident occurred at a Mississippi Department of Transportation (MDOT) railroad crossing in Florence, Mississippi. At the time of the accident the crossing did not have automatic gates, but was equipped with automatic, flashing warning lights which had been installed using federal funds.

Smallwood filed suit in Mississippi state court alleging negligence claims against Illinois Central and MDOT. The complaint averred that MDOT negligently failed to install gates at the crossing despite its knowledge that the crossing was unreasonably dangerous and extraordinarily hazardous.

It also alleged that MDOT had more than six months before the accident authorized and directed Illinois Central to construct gates at the crossing, and the Federal Highway Administration had approved of this installation and allowed federal funding to be used for it, but MDOT and the railroad had negligently delayed in installing the gates.

Illinois Central removed the case to federal court on the basis of diversity jurisdiction and fraudulent joinder.[1] It asserted that Smallwood's joinder of MDOT as a defendant was fraudulent because she could state no claim against MDOT, since the Federal Railroad Safety Act (FRSA)[2] preempted her claims against it.[3] The district court agreed, denying Smallwood's motion to remand and later dismissing MDOT from the case.[4] As the only remaining defendant in

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[1] Illinois Central is a citizen of Illinois, and Smallwood is a citizen of Mississippi. Illinois Central argued that for purposes of diversity jurisdiction the district court should ignore MDOT's presence because it was fraudulently joined.

[2] 49 U.S.C. §§ 20101-20153.

[3] Illinois Central argued that the principles of conflict preemption, not complete preemption, applied. Since it did not allege complete preemption, it did not remove on the basis of federal question jurisdiction, because the well-pleaded complaint rule would have precluded removal on that ground. See *infra* note 53.

[4] With regard to the delay-in-installation claim, the district court's fraudulent joinder determination rested not only on its finding that the FRSA preempted all of Smallwood's claims, but also on its conclusion that Smallwood "did not satisfy her burden of showing that" MDOT had directed Illinois Central to install automatic gates at the crossing. However, as we recently reminded, it is the *removing party's* burden to show that "there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the non-diverse defendant in state court." *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir.2003) (internal quotation marks and italics omitted). Since Illinois Central, the removing defendant, bore the burden of proving that Smallwood had fraudulently joined MDOT, it was required to "put forward evidence that would negate a possibility of liability on the part of" MDOT. *Id.* However, Illinois

the suit, Illinois Central then moved for summary judgment on the basis that the FRSA also preempted Smallwood's claim against it. The district court granted the motion and entered judgment in favor of the railroad.

Smallwood has timely appealed, urging error in the denial of her motion to remand and the dismissal of MDOT. We conclude that the trial judge erred in finding that MDOT was fraudulently joined, and vacate the judgment and remand this case to the district court with instruction to remand it to the state court from which it was removed.

I

Smallwood argues that there was no fraudulent joinder and therefore the district court erred in refusing to remand the case. We review de novo the district court's order denying Smallwood's motion to remand and its decision that MDOT was fraudulently joined.[5] The removing party bears the burden of establishing fraudulent joinder, and can do this either by showing "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court."[6] The district court found fraudulent joinder because it determined that Smallwood could not establish her claims

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Central has pointed to no evidence it proffered to the district court contradicting Smallwood's assertion that MDOT authorized and directed Illinois Central to install automatic gates at the crossing. "[S]imply pointing to the plaintiff's lack of evidence at this stage of the case is insufficient to show that there is no possibility for [Smallwood] to establish [MDOT's] liability at trial." *Id.* at 650-51. The district court therefore reversed the burden of proof in concluding that Smallwood "did not satisfy her burden of showing that" MDOT "was not fraudulently joined." The only other basis for the district court's fraudulent joinder finding was its conclusion that the FRSA preempted Smallwood's claims against MDOT.

[5] *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 311 (5th Cir.2002).

[6] *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir.2003).

against MDOT in state court. Such a finding of fraudulent joinder can stand only if the plaintiff has no possibility of recovery against that defendant.[7] "If there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved, then there is no fraudulent joinder. This possibility, however, must be reasonable, not merely theoretical."[8]

In determining fraudulent joinder, a trial judge may "pierce the pleadings" and consider summary judgment-type evidence in the record.[9] However, the court "must also take into account all unchallenged factual allegations, including those alleged in the complaint, in the light most favorable to the plaintiff" and resolve any contested issues of fact and legal ambiguities in the plaintiff's favor.[10] "The burden of persuasion on those who claim fraudulent joinder is a heavy one."[11]

II

Relying on *Chesapeake & Ohio Railway Co. v. Cockrell*[12] and *Boyer v. Snap-On Tools Corp.*,[13] Smallwood argues that there was no fraudulent joinder because its only basis was MDOT's federal preemption defense, which was also asserted as a defense by Illinois Central, the diverse defendant. In *Cockrell*, an administrator of an estate, who resided in Kentucky, had filed suit in a state court of Kentucky against a Virginia railway company and an engineer and fireman who

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[7] *Id.* at 648.

[8] *Id.* (italics and internal quotation marks omitted).

[9] *Id.* at 649.

[10] *Id.*

[11] *Id.*

[12] 232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544 (1914).

[13] 913 F.2d 108 (3d Cir.1990).

both lived in Kentucky.[14] The suit sought to recover damages for the death of the administrator's intestate, who was struck by a train.[15] The railway company attempted to remove the case to federal court on the basis that the plaintiff had fraudulently joined the railway employees to defeat federal jurisdiction.[16] The state court, declining to surrender its jurisdiction, proceeded to a trial and entered judgment against the company, which the state court of appeals affirmed.[17]

The Supreme Court granted certiorari to determine "whether it was error thus to proceed to an adjudication of the cause notwithstanding the company's effort to remove it into the Federal court."[18] It concluded that the trial court had not erred in rejecting the railway company's fraudulent joinder argument, which consisted of the short and plain statement that "the charges of negligence . . . against the defendants were each and all 'false and untrue and were known by the plaintiff, or could have been known by the exercise of ordinary diligence, to be false and untrue. . . .'"[19] It reached this conclusion on the basis that the plaintiff's negligence allegations against the railway employees applied with equal force to the company, which was only liable if the employees were also liable.[20] The Court reasoned that although the plaintiff's petition "may have disclosed an absence of good faith on the part of the plaintiff in bringing the action at all, . . . it did not show a fraudulent joinder of the engineer

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[14] 232 U.S. at 150, 34 S.Ct. 278.

[15] *Id.* at 149-50, 34 S.Ct. 278.

[16] *Id.* at 150-51, 34 S.Ct. 278.

[17] *Id.* at 150, 34 S.Ct. 278.

[18] *Id.*

[19] *Id.* at 151, 34 S.Ct. 278.

[20] *Id.* at 152-53, 34 S.Ct. 278.

and fireman."[21] Since "no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter," the fraudulent joinder allegations "manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants."[22] The Court concluded:

> Plainly, this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them. As they admittedly were in charge of the movement of the train, and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky, to insist upon their presence as real defendants as upon that of the railway company. We conclude, therefore, that the petition for removal was not such as to require the state court to surrender its jurisdiction.[23]

Smallwood argues that *Cockrell* applies to her case because she alleged that Illinois Central and MDOT were jointly and severally liable for her injury, and the railroad's contention that her claim against MDOT is preempted by the FRSA is in actuality not a claim that MDOT has been fraudulently joined

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[21] *Id.* at 153, 34 S.Ct. 278.

[22] *Id.*

[23] *Id.* at 153-54, 34 S.Ct. 278; *see also Chi., Rock Island & Pac. Ry. Co. v. Whiteaker*, 239 U.S. 421, 425, 36 S.Ct. 152, 60 L.Ed. 360 (1915) (relying on *Cockrell* to reject the defendant railway's argument that the plaintiff had fraudulently joined the defendant train conductor to defeat diversity jurisdiction); *Ill. Cent. R.R. Co. v. Sheegog*, 215 U.S. 308, 316, 30 S.Ct. 101, 54 L.Ed. 208 (1909) (rejecting the defendants' fraudulent joinder argument because "the joinder could not be fraudulent in a legal sense on any ground except that the charge against [the diverse defendant] was fraudulent and false").

but instead an assertion that her case is "ill founded as to all the defendants." She asserts that preemption of her claims is a merits determination for a Mississippi state court to make.

Smallwood also relies upon the Third Circuit's decision in *Boyer v. Snap-On Tools Corp.*,[24] in which the plaintiff, a former dealer of Snap-On Tools, filed suit in Pennsylvania state court against the company and two of its employees, alleging, *inter alia*, that they had misrepresented the profitability of the dealership, the risk of failure, and the amount of capital needed to begin a dealership.[25] The defendants urged that Boyer had signed a release waiving any and all claims arising out of the plaintiff's dealership.[26] The parties lacked diversity because the plaintiff and the employee defendants resided in Pennsylvania, although the company was a Delaware corporation with its principal place of business in Wisconsin.[27] Still, the defendants removed the case to federal court on the basis of diversity jurisdiction and fraudulent joinder, contending that the plaintiff had no colorable claim against the employee defendants because of the release.[28]

The district court denied the plaintiff's motion to remand on the basis of the release and granted summary judgment to both Snap-On and the employee defendants on that same ground.[29] The Third Circuit reversed, reasoning that in addressing the fraudulent joinder question it need not decide whether the release applied to the claims against the employee defendants because "that issue . . . [was] equally

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[24] 913 F.2d 108, 109-10 (3d Cir.1990).

[25] *Id.*

[26] *Id.* at 110.

[27] *Id.* at 109.

[28] *Id.* at 110.

[29] *Id.*

applicable to Snap-On";[30] "ultimately, this is what the district court decided when it granted summary judgment" in favor of all of the defendants based on the release.[31] The *Boyer* court explained, "in the guise of deciding whether the joinder was fraudulent," the district court "stepped from the threshold jurisdictional issue into a decision on the merits."[32]

Boyer cited *Cockrell* and reasoned that, as in *Cockrell*, all of the defendants had raised the same dispositive defense based on the release, and the plaintiff's arguments that the release was invalid "involve identical legal and factual issues applicable to the individual defendants and Snap-on."[33] That court concluded:

> [W]here there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court.[34]

Several district courts across the country have applied identical reasoning in refusing to find fraudulent joinder

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[30] *Id.* at 112.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 112-13.

[34] *Id.* at 113; *cf.* 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3721 (3d ed. Supp.2003) ("[T]he defendant may not use removal proceedings as an occasion to adjudicate the substantive issues of a case. Thus, a nondiverse codefendant may not remove a case to federal court on the theory that because it was not liable to the plaintiff, it should be disregarded for removal jurisdiction purposes. In such a situation, the question of the defendant's liability should be adjudicated in the state forum and not, de facto, in the context of procedures such as removal.").

where the only basis for the claim is a defense equally applicable to all of the defendants, diverse and nondiverse.[35]

Illinois Central and MDOT reply that we have allowed fraudulent joinder claims to be premised on the validity of the nondiverse defendants' affirmative defenses and that we have also refused to remand a case on the basis of the common defense theory. Although we have before looked to the validity of a nondiverse party's affirmative defenses in determining whether that party was fraudulently joined, we did not confront, much less decide, whether defenses common to diverse and nondiverse defendants could serve as the basis for a claim of fraudulent joinder.[36]

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[35] *See, e.g., Lovell v. Bad Ass Coffee Co. of Hawaii, Inc.*, 103 F.Supp.2d 1233, 1237 (D.Haw.2000) ("There is a distinction . . . between a complete lack of a cause of action against a sham defendant and an inquiry as to whether those defendants could propound defenses to an otherwise valid cause of action. A finding of fraudulent joinder is improper if the defendant's assertions go to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." (internal quotation marks omitted)); *Cheskiewicz ex rel. Cheskiewicz*, No. 02-3583, 2002 WL 1880524, at *3 (E.D.Pa. Aug.15, 2002) ("[T]he defendants' arguments about the effect of the Vaccine Act on plaintiffs' claims are not unique to . . . the non-diverse defendants, but are instead general to all removing defendants. Each is a manufacturer of a vaccine or Thimerosal having allegedly impacted the plaintiffs, and each will have the same opportunity to assert the Vaccine Act as a defense to plaintiffs' claims. However meritorious those defenses may be, they are not unique to the non-diverse parties. Their disposition is a merits determination which must be made by the state court." (internal quotation marks omitted)).

We do not address today the situation in which a defense is not common to all defendants.

[36] *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746, 753 (5th Cir.1996) ("Having concluded that Sid Richardson successfully stated a claim for breach of contract and corporate disregard, we turn to the affirmative defenses raised by the [nondiverse] defendants. Should the defendants prevail on any of these defenses, it necessarily follows that joinder was fraudulent, and the district court properly

MDOT and the railroad argue that *Dudley v. Community Public Service Co.* decided the question.[37] *Dudley* held that the district court erred in denying the plaintiffs' remand motion, reasoning that a Texas law did not apply to prohibit the plaintiffs' claims against the nondiverse defendant.[38] The plaintiffs, the widow and dependent of a deceased electric company employee who had been electrocuted on the job, had sued the company and the deceased's superintendent for gross negligence.[39] The superintendent and the plaintiffs both lived in Texas, while the company was a citizen of Delaware.[40] Nevertheless, the company removed the case to federal court on the basis of diversity jurisdiction, arguing that the plaintiffs had fraudulently joined the superintendent because the Texas Workmen's Compensation Law acted as a defense to the plaintiffs' claims against the employee.[41] The court rejected this contention, finding that the law allowed an action against the superintendent for exemplary damages.[42]

The company never claimed that the Compensation Law barred the plaintiffs' claims against it. Instead, we explained that the company contended that the law blocked any action against "a co-employe[e] for injury or death" so "there could

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exercised its removal jurisdiction. On the other hand, if there is any possibility that Sid Richardson might survive the affirmative defenses, we must vacate for remand to state court."). In that case we had no need to broach the issue whether a defense equally applicable to all defendants could not serve as the basis for a fraudulent joinder argument because we found that the motion to remand should have been granted on the alternative basis that, even considering the defenses raised by the defendants, they did not preclude the plaintiff's claim. *Id.* at 753-57.

[37] 108 F.2d 119 (5th Cir.1939).

[38] *Id.* at 123.

[39] *Id.* at 120-21.

[40] *Id.* at 120.

[41] *Id.* at 121.

[42] *Id.* at 122-23.

be no right of action against" the superintendent.[43] The only indication that the Compensation Law could be applied to defeat the plaintiffs' claims against both defendants is the court's statement that if section three of the law, which provided that employees of a company falling within the scope of the law had no right of action against their employer or co-employees for personal injuries, were read in isolation of the other sections, "Dudley's representatives could sue neither [the superintendent] nor the common employer."[44] However, the court quickly added that section five allowed a plaintiff to recover exemplary damages from an employer for personal injuries.[45] Thus, the only question was whether the law also allowed exemplary damages against a co-employee. The court found that the law did allow such damages, and that therefore the defendant superintendent was not fraudulently joined.[46]

The only other case Illinois Central and MDOT rely upon in asserting that we must reject the common defense theory is a District of Colorado case, *Frontier Airlines, Inc. v. United Air Lines, Inc.*[47] The Frontier court found fraudulent joinder on the basis of the defendants' common conflict preemption defense and applied its preemption analysis to the plaintiff's claims against the diverse defendant.[48] However, the opinion does not consider *Cockrell* or *Boyer*. Indeed, the plaintiff apparently did not argue that fraudulent joinder could not be based on the common preemption defense.[49]

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[43] *Id.* at 121.

[44] *Id.*

[45] *Id.* at 122.

[46] *Id.*

[47] 758 F.Supp. 1399 (D.Colo.1989).

[48] *Id.* at 1411.

[49] Although not cited by MDOT and Illinois Central, *Ritchey v. Upjohn Co.*, 139 F.3d 1313 (9th Cir.1998), also supports their argument. There the

Illinois Central and MDOT have cobbled together no reasoned support for their position, which is contrary to the Supreme Court's century-old command in *Cockrell* that the fraudulent joinder allegations be directed toward the joinder, not to "the merits of the action as an entirety." Moreover, it contravenes the purpose of the fraudulent joinder doctrine, which is to prevent a plaintiff from naming a nondiverse party as a defendant solely for the purposes of depriving the court of jurisdiction.[50]

III

Reference to traditional removal rules and principles persuade that the *Boyer* court's holding, based on *Cockrell*, is necessary to prevent erosion of the well-pleaded complaint rule and serves the federal-state balance. The well-pleaded complaint rule bars removal on the basis of federal question jurisdiction unless that jurisdiction is evident from the face of

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Ninth Circuit found fraudulent joinder because the claims against the nondiverse defendants were barred by the statute of limitations. *Id.* at 1319-20. It did so despite the fact that the same statute of limitations defense applied to bar the claim against the diverse defendant. *Id.* at 1320. However, the Ritchey court acknowledged the awkwardness of applying a common defense to find fraudulent joinder:

> We recognize that it is, perhaps, slightly peculiar to speak of [the nondiverse defendants] as sham defendants because the statute of limitations bars a claim against them, when that would seem to lead to an argument that [the diverse defendant] itself is a sham defendant because the statute of limitations has also run against it. Nevertheless, the fact is that [the plaintiff] did not state a cause of action against anyone, and his failure to state that cause of action against [the nondiverse defendants] demonstrates beyond peradventure that they were sham defendants for purposes of removal.

Id.

[50] *See* 15 MOORE'S FEDERAL PRACTICE § 102.21[5][a] (James Wm. Moore et al., eds., 3d ed.1998).

the complaint.[51] A federal defense then does not give a defendant the right to remove:

> "[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case."[52]

It is true that complete preemption acts as a narrow exception to the well-pleaded complaint rule, but neither Illinois Central nor MDOT disputes that it is conflict preemption, not complete preemption, which is at issue here.[53]

Because Illinois Central claims only conflict preemption, it is not entitled, under the well-pleaded complaint rule, to a

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[51] *Terrebonne Homecare, Inc. v. SMA Health Plan, Inc.*, 271 F.3d 186, 188 (5th Cir.2001).

[52] *Roark v. Humana, Inc.*, 307 F.3d 298, 304 (5th Cir.2002) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13-14, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)).

[53] Complete preemption occurs when a federal statute has a "preemptive force . . . [that] is so powerful as to displace entirely any state causes of action." *Id.* at 305 (internal quotation marks omitted). If "a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily arises under federal law." *Id.* (internal quotation marks omitted). Such an action is excepted from the well-pleaded complaint rule and confers original and removal jurisdiction. *Id.*

On the other hand, conflict preemption, also known as ordinary preemption, fails to establish federal question jurisdiction. "Rather than transmogrifying a state cause of action into a federal one—as occurs with complete preemption—conflict preemption serves as a defense to a state action." *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 337 (5th Cir.1999). The well-pleaded complaint rule prevents a defendant from removing simply on the basis of conflict preemption. *Roark*, 307 F.3d at 305.

federal forum for its resolution.[54] If Illinois Central had removed on the basis of federal question jurisdiction, pointing to a federal defense, the district court could not have "resolve[d] the dispute regarding preemption," and would have "lack[ed] power to do anything other than remand to the state court where the preemption issue [could] be addressed and resolved."[55] We, like the Third Circuit, recognize that "[s]tate courts are competent to determine whether state law has been preempted by federal law, and absent complete preemption, they must be permitted to perform that function with regard to state law claims brought before them."[56]

Regardless of whether it intended to, Illinois Central circumvented this limit on removal jurisdiction by removing on the basis of its conflict preemption defense but clothing it in a claim of diversity jurisdiction and fraudulent joinder. It successfully convinced the district court to decide the preemption question, which if Illinois Central had removed the case on the basis of federal question jurisdiction the court would have had no power to do, in the guise of determining whether MDOT, the non-diverse party, had been fraudulently joined. This use of fraudulent joinder frustrates the overarching principle of the well-pleaded complaint rule, that state courts are equally competent to decide federal defenses.

IV

We conclude that the district court erred in denying Smallwood's motion to remand and in dismissing MDOT as a party, vacate the judgment in favor of Illinois Central, and remand the case to the district court with instruction to remand it to the state court from which it was removed. It is

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[54] *Roark*, 307 F.3d at 305.

[55] *Giles*, 172 F.3d at 337.

[56] *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 316 (3d Cir.1994) (internal quotation marks omitted).

for Mississippi state courts to decide the merits of MDOT and Illinois Central's common preemption defense.

VACATED and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT,
S.D. MISSISSIPPI, JACKSON DIVISION

No. CIV.A.3:01-CV-561BN

KELLI SMALLWOOD,
Plaintiff,

v.

ILLINOIS CENTRAL RAILROAD COMPANY;
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Defendants.

August 14, 2002

OPINION AND ORDER

Barbour, District Judge.

This cause is before the Court on four related motions. The Court has considered the motions, responses, rebuttals, attachments to each, and supporting and opposing authority and finds as follows:

The Motion of Defendant the Mississippi Department of Transportation to Dismiss is well taken and should be granted.

The Motion of Plaintiff to Amend Order Dated March 15, 2002, should be dismissed as moot.

The Motion of Defendant Illinois Central Railroad Company to Exclude Evidence should be granted in part and denied in part.

The Motion of Defendant Illinois Central Railroad Company for Summary Judgment is well taken and should be granted.

I. Factual Background and Procedural History

On June 23, 2000, Plaintiff was injured when a locomotive operated by Defendant Illinois Central Railroad Company ("IRC") struck the automobile in which she was traveling. The incident occurred at Mississippi Department of Transportation ("MDOT") railroad crossing number 305451Y located at Highway 469, Florence, Mississippi ("Highway 469 Crossing").

On June 21, 2001, Plaintiff filed a lawsuit in the First Judicial District of the Circuit Court of Hinds County, Mississippi, alleging claims of negligence against IRC and MDOT. At the time of the accident, the railroad crossing was equip d with automatic, flashing warning lights which had been installed using federal funds. Plaintiff first alleges negligence on the part of the MDOT arising from its failure to install automatic gates at the subject crossing despite its knowledge that the crossing was "unreasonably dangerous and extraordinarily hazardous." Complaint, ¶ 8. This "failure to install gates" claim, which challenges the adequacy of the warning devices at the subject railroad crossing, is only alleged against the MDOT. Plaintiff next alleges that IRC "received authorization and direction from the MDOT to construct gates at the subject crossing on or about December 13, 1999," the cost for which was to be paid by the MDOT. *Id.*, ¶ 11. Plaintiff further alleges that despite this authorization, direction and funding, the automatic gates were not installed prior to the date on which she was injured. Based, in part, on these assertions, Plaintiff alleges a "negligent delay in gate installation" claim against both IRC and the MDOT.

On July 20, 2001, Defendant IRC removed the case to federal court pursuant to 28 U.S.C. § 1441 on the basis of diversity of citizenship jurisdiction under 28 U.S.C. § 1332. For the purpose of diversity analysis, Defendant IRC is a corporate citizen of, and has its primary place of business in, the State of Illinois. Plaintiff and Defendant the MDOT are both citizens of the State of Mississippi. This Court, by a prior Opinion and order, found that Plaintiff did not have a possibility of establishing a cause of action against the non-diverse MDOT as the claims she alleges against that defendant are preempted by federal law. *See Smallwood v. Illinois Cent. R.R. Co.*, 203 F. Supp. 2d 686 (S.D. Miss. 2002). The Court, therefore, concluded that the MDOT had been fraudulently joined, that its citizenship should not be considered for the purpose of diversity analysis, and that the Court could properly assert federal subject matter jurisdiction under 28 U.S.C. § 1332.

The MDOT now moves to be dismissed from this lawsuit pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). Plaintiff moves to have the Court amend its March 15, 2002, Opinion and Order to include the entry of a final judgment as to the MDOT. Also before the Court are the motions of IRC to exclude evidence and for summary judgment.

II. Analysis

A. Motion of the MDOT to Dismiss

The MDOT moves to be dismissed pursuant to Rule 12(b)(6) of the FRCP. Plaintiff does not oppose the motion to dismiss but requests that the dismissal be with prejudice.

For the purpose of a motion to dismiss under Rule 12(b)(6) of the FRCP, all material allegations in the complaint must be taken as true and construed in the light most favorable to plaintiff. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale*

Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). A Rule 12(b)(6) dismissal is not appropriate unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proven. *Conley v. Gipson*, 355 U.S. 41, 45-46 (1957). However, a complaint may be dismissed if it fails to allege an element of a claim necessary to obtain relief. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). Moreover, conclusory allegations or legal conclusions, as opposed to factual conclusions, will not prevent the granting by a court of a motion to dismiss. *Id.* (citing *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278 (5th Cir. 1993)).

This Court previously found that Plaintiff could not recover on the "failure to install gates" claim and/or the negligent "delay in gate installation" claim alleged against the MDOT because these claims are preempted by federal law. *See Smallwood*, 203 F. Supp. 2d 686. For the reasons stated in its prior Opinion and Order, the Court now finds that as Plaintiff's claims are preempted, she has failed to state a claim upon which relief may be granted. Accordingly, the Court finds that the MDOT should be dismissed from this lawsuit with prejudice.

B. Motion of Plaintiff to Amend March 15, 2002, Order.

Plaintiff requests that the Court amend its March 15, 2002, Opinion and Order to enter a final judgment as to Defendant the MDOT pursuant to Rule 54(b) of the FRCP. The Court finds that as it will enter a final judgment this day by which the MDOT will be dismissed from this lawsuit with prejudice, the Motion of Plaintiff to Amend should be dismissed as moot.

C. Motion of IRC to Exclude Evidence

Plaintiff, in support of her response to the Motion of Defendant for Summary Judgment, submitted (1) a

correspondence dated October 19, 1993, from the Rankin County School District to the MDOT concerning the potential for accidents and the lack of gates at the Highway 469 Crossing, (2) a Project Authorization Agreement from the United States Department of Transportation providing federal funds to install signals with gates at the Highway 469 Crossing, and (3) a December 13, 1999, correspondence from the MDOT granting IRC "formal Notice-to-Proceed" on the installation of automatic gates at the Highway 469 Crossing. *See* Response to Motion for Summary Judgment, Exhibits A, C, and D, respectively. IRC seeks to have this evidence excluded under 23 U.S.C. § 409 which provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to section 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned above or addressed in such reports, surveys, schedules, lists, or data.

This statute was enacted in the following context:

> A number of years ago, the federal government developed a program for enhancing the safety of railroad crossings across the country. The states were encouraged to participate under federal guidelines and upon compliance would receive ninety percent federal funding for such upgrade projects. Federal law and regulation directed the states to survey their circumstances and prepare data on crossings where

> safety improvements may be needed. To the end that candor might obtain [sic] regarding hazards that exist, the Congress acted to protect information developed in connection with the program for use in any civil litigation arising out of railroad crossing accidents.

Sawyer v. Illinois Cent. R.R. Co., 606 So. 2d 1069, 1073 (Miss. 1992). *See also Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (recognizing that "the underlying intent of [23 U.S.C. § 409] is to facilitate candor in administrative evaluations of highway safety hazards and to prohibit federally required record-keeping from being used as a tool in private litigation.") (alterations in original) (citations omitted). The Court finds, based on the plain language of the statute and the manner in which it has been interpreted by other courts, that its exclusionary scope only applies to specific evidence collected or compiled by the states to obtain federal funding for safety improvements at railroad crossings as required under federal law. See 23 U.S.C. § 130 (requiring each state to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may required separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose.").

With regard to Exhibits C and D, IRC submitted the Affidavit of Steven K. Edwards who avers that the State of Mississippi participates in the Federal-Aid Highway Safety Program funded through the Federal Highway Administration and that the subject exhibits were compiled for the purpose of construction of safety improvements at the Highway 469 Crossing. *See* Motion to Exclude, Exhibit A. The record also shows that federal funding was approved for installation of automatic gates at the subject crossing. *See* Response to Motion for Summary Judgment, Exhibit C. Plaintiff has not presented any evidence to refute these averments.

The Court, having reviewed the subject exhibits, finds that their purpose was to identify and plan safety improvements at

the Highway 469 Crossing pursuant to 23 U.S.C. § 130, and that the improvements were to be paid through federal funding. The Court, therefore, finds that Exhibits C and D to Plaintiff's Response to Motion for Summary Judgment are inadmissible under 23 U.S.C. § 409. The Court, however, was not presented any evidence to show that Exhibit A to Plaintiff's Response to Motion for Summary Judgment was collected or compiled for the purpose of planning safety improvements at the Highway 469 Crossing. The Court, therefore, finds that Exhibit A is not within the exclusionary scope of 23 U.S.C. § 409.

Plaintiff also argues that the protection provided by 23 U.S.C. § 409 has been waived because "the documents sought to be excluded by IRC were voluntarily produced by MDOT to Plaintiff's counsel [in] the case of *Cagle v. Illinois Central Railroad Co.*, No. 98-257 (Cir. Ct. Rankin County, Miss.)." Memorandum in Support of Response to Motion to Exclude, 4. The Court was not presented any caselaw to support Plaintiff's argument that a waiver may be predicated on the production of documents by a third-party in an unrelated case. Further, waiver generally requires a voluntary disclosure by the party who holds the privilege. *See Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (discussing waiver of attorney-client privilege). *See also Transamerica Computer Co. v. International Bus. Mach. Corp.*, 573 F.2d 646, 650-52 (9th Cir. 1978) (finding that a privilege is waived only in the event the privilege holder voluntarily discloses the communication). Based on the facts presented, the Court finds that IRC did not waive any privilege provided by 23 U.S.C. § 409.

The Court will grant the Motion of IRC to Exclude in part and deny it in part.

D. Motion of IRC for Summary Judgment

1. Standard

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 549 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. *Id.* As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non-moving party's claim. *Id.* at 323-24. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact

exists. It is improper for the district court to "resolve factual disputes by weighing conflicting evidence, . . . since it is the province of the jury to assess the probative value of the evidence." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is also improper where the court merely believes it unlikely that the non-moving party will prevail at trial. *National Screen Serv. Corp. v. Poster Exchange, Inc.*, 305 F.2d 647 (5th Cir. 1962).

2. Analysis

Plaintiff, in her complaint, alleges that IRC negligently delayed installing automatic gates at the Highway 469 Crossing and that this delay proximately caused the injuries about which she complains. This Court previously found that Plaintiff's claim of negligent "delay in gate installation" against the MDOT, which is identical to the one asserted against IRC, was preempted under federal law. *See Smallwood*, 203 F. Supp. 2d 686. IRC contends that the Court, based on its prior ruling, should find that the negligent "delay in gate installation" claim alleged against it is also preempted under federal law and, therefore, grant summary judgment in its favor.

The law of the case doctrine:

> is a rule of practice under which a rule of law enunciated by a federal court "not only establishes a precedent for subsequent cases under the doctrine of *stare decisis*, but [also] establishes the law which other courts owing obedience to it must, and which it itself will, normally, apply to the same issues in subsequent proceedings in the same case."

Morrow v. Dillard, 580 F.2d 1284, 1289 (5th Cir. 1978) (quoting 1B MOORE'S FEDERAL PRACTICE § 0.404[1] (2d ed. 1974)). Under this doctrine, a federal district court has the duty "to follow what has been decided at an earlier stage of the case." *Id.* at 1290. A court, however, may reexamine its prior decision in the event: "(i) the evidence on a subsequent

trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work manifest injustice." *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 880 (5th Cir. 1993).

Plaintiff has not presented any additional evidence in support of her response to the subject motion for summary judgment. Additionally, in the event the Court erred in determining that 23 U.S.C. § 409 barred the admission of some of the exhibits submitted, the Court finds that the exhibits excluded are not material to the issue of preemption. Second, Plaintiff has not presented a contrary decision on the law applicable to the issue of preemption under the Federal Railroad Safety Act, codified at 49 U.S.C. § 20101, *et seq.*, from the United States Supreme Court, the United States Court of Appeals for the Fifth Circuit, or this Court. Finally, Plaintiff has not persuaded the Court that its prior decision on the issue of preemption is clearly erroneous and therefore would result in a manifest injustice.

The Court finds, for the reasons set forth in *Smallwood v. Illinois Central Railroad Co.*, 203 F. Supp. 2d 686, that Plaintiff's negligent "delay in gate installation" claim against IRC is preempted under federal law. The Court, therefore, finds that IRC is entitled to summary judgment on that claim.

IV. Conclusion

For the foregoing reasons, and the reasons set forth in *Smallwood v. Illinois Central Railroad Co.*, 203 F. Supp. 2d 686 (S.D. Miss. 2002):

> IT IS THEREFORE ORDERED that the Motion of Defendant the MDOT to Dismiss [12-1], [14-1] is hereby granted.
>
> IT IS FURTHER ORDERED that the Motion of Plaintiff to Amend [13-1] is hereby dismissed as moot.

IT IS FURTHER ORDERED that the Motion of Defendant IRC to Exclude [19-1] is hereby granted in part and denied in part.

IT IS FURTHER ORDERED that the Motion of IRC for Summary Judgment [15-1] is hereby granted.

A final judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure shall be entered this day.

APPENDIX D

UNITED STATES DISTRICT COURT,
S.D. MISSISSIPPI, JACKSON DIVISION

No. CIV.A.3:01-CV-561BN

KELLI SMALLWOOD,
Plaintiff,

v.

ILLINOIS CENTRAL RAILROAD COMPANY;
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Defendants.

March 15, 2002

OPINION AND ORDER

Barbour, District Judge.

This cause is before the Court on the Motion of Plaintiff to Remand. The Court has considered the motion, response, rebuttal, attachments to each, and supporting and opposing authority and finds that the motion is not well taken and should be denied.

I. Factual Background and Procedural History

On June 23, 2000, Plaintiff was injured when a locomotive operated by Defendant Illinois Central Railroad Company ("IRC") struck the automobile in which she was traveling. The incident occurred at Mississippi Department of Transportation ("MDOT") railroad crossing number 305451Y located at Highway 469, Florence, Mississippi.

On June 21, 2001, Plaintiff filed a lawsuit in the First Judicial District of the Circuit Court of Hinds County, Mississippi, alleging claims of negligence against IRC and MDOT. At the time of the accident, the railroad crossing was equipped with automatic, flashing warning lights which had been installed using federal funds. Plaintiff first alleges negligence on the part of the MDOT arising from its failure to install automatic gates at the subject crossing despite its knowledge that the crossing was "unreasonably dangerous and extraordinarily hazardous." Complaint, ¶ 8. This "failure to install gates" claim, which challenges the adequacy of the warning devices at the subject railroad crossing, is only alleged against the MDOT. Plaintiff next alleges that IRC "received authorization and direction from the MDOT to construct gates at the subject crossing on or about December 13, 1999," the cost for which was to be paid by the MDOT. *Id.*, ¶ 11. Plaintiff further alleges that despite this authorization, direction and funding, the automatic gates were not installed prior to the date on which she was injured. Based, in part, on these assertions, Plaintiff alleges a "negligent delay in gate installation" claim against both IRC and the MDOT.

On July 20, 2001, Defendant IRC removed the case to federal court pursuant to 28 U.S.C. § 1441 on the basis of diversity of citizenship jurisdiction under 28 U.S.C. § 1332. For the purpose of diversity analysis, Defendant IRC is a corporate citizen of, and has its primary place of business in, the State of Illinois. Plaintiff and Defendant the MDOT are both citizens of the State of Mississippi. IRC, however, contends that Plaintiff has fraudulently joined the non-diverse Defendant and, therefore, the Court may properly assert federal subject matter jurisdiction over this case. IRC further contends that although the state court complaint does not specify the total amount of damages sought by Plaintiff, that Plaintiff seek greater than the requisite amount of $75,000.00.

Plaintiff does not dispute this assertion. The Motion of Plaintiff to Remand is presently before the Court.

II. Fraudulent Joinder Standard

Under 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending." The removing party has the burden of proving that the federal court has jurisdiction to hear the case. *See Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir.1993), *cert. denied*, 510 U.S. 868, 114 S.Ct. 192, 126 L.Ed.2d 150 (1993); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir.1989) (holding that the "removing party bears the burden of establishing federal jurisdiction."). In cases in which the removing party alleges diversity of citizenship jurisdiction on the basis of fraudulent joinder, "it has the burden of proving the fraud." *Laughlin*, 882 F.2d at 190; *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir.1990), *cert. denied* 498 U.S. 817, 111 S.Ct. 60, 112 L.Ed.2d 35 (1990). To establish fraudulent joinder, the removing party must prove: (1) that there was actual fraud in the plaintiff's pleading of the jurisdictional facts or (2) that the plaintiff has no possibility of establishing a cause of action against the non-diverse defendant in state court. *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir.1999) (citations omitted); *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir.1995); *Cavallini v. State Farm Mutual Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir.1995).

When considering whether a non-diverse defendant has been fraudulently joined to defeat diversity of citizenship jurisdiction, courts should "pierce the pleadings" and consider "summary judgment-type evidence such as affidavits and deposition testimony." *See e.g. Cavallini*, 44 F.3d at 256. *See also LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th

Cir.1992) (holding that "a removing party's claim of fraudulent joinder to destroy diversity is viewed as similar to a motion for summary judgment. . . . A court is to pierce the pleadings to determine whether, under controlling state law, the non-removing party has a valid claim against the non-diverse parties."). Under this standard, plaintiffs "may not rest upon the mere allegations or denials of [their] pleadings." *Beck v. Texas State Bd. of Dental Examiners*, 204 F.3d 629, 633 (5th Cir.2000). *See also Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n. 4 (5th Cir.2000) (finding that the "mere theoretical possibility of recovery under local law" does not preclude removal. Plaintiffs must show that there exists "a reasonable basis for predicting that state law would allow recovery in order to preclude a finding of fraudulent joinder."). Further, conclusory or generic allegations of wrongdoing on the part of the non-diverse defendant are not sufficient to show that that defendant was not fraudulently joined. *See Badon v. RJR Nabisco, Inc.*, 224 F.3d 382, 392-93 (5th Cir.2000); *Peters v. Metropolitan Life Ins. Co.*, 164 F.Supp.2d 830, 834 (S.D.Miss.2001) (J. Bramlette) (holding that the allegations against non-diverse defendants "must be factual, not conclusory, because conclusory allegations do not state a claim."). Therefore, when responding to a charge of fraudulent joinder, a plaintiff must allege specific acts of wrongdoing on the part of the non-diverse defendant in the complaint and submit evidence to support those claims. *See Badon*, 224 F.3d at 390 (holding that removal is not precluded merely because the state court complaint, on its face, sets forth a state law claim against a non-diverse defendant. Removal is proper "if the plaintiff's pleading is pierced and it is shown that as a matter of law there is no reasonable basis for predicting that the plaintiff might establish liability on that claim against the in-state defendant.").

When conducting a fraudulent joinder analysis, a court must resolve all disputed questions of fact and ambiguities of

law in favor of the non-removing party, *see Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir.1992), but "only when there exists an actual controversy, *i.e.* when both parties have submitted evidence of contradictory facts." *Badon*, 224 F.3d at 394. A court should not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts" to support his claims against the non-diverse defendant. *Id.* (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994)) (alteration in original). In the event the court, after resolving all disputed questions of fact and ambiguities of law in favor of the non-removing party, finds that there is "arguably a reasonable basis for predicting that the state law might impose liability on the facts involved, then there is no fraudulent joinder" and hence no basis for asserting diversity of citizenship jurisdiction. *Jernigan*, 989 F.2d at 816.

III. Analysis

IRC does not allege that Plaintiff engaged in actual fraud in the pleading of the jurisdictional facts in this case. Further, IRC does not dispute that the MDOT is a citizen of the State of Mississippi for the purpose of diversity analysis. Instead, IRC argues that Plaintiff cannot establish a cognizable cause of action against the MDOT because the claims of negligence alleged against it in the complaint are preempted by the Federal Railroad Safety Act of 1970 ("FRSA"), codified at 49 U.S.C. § 20101, *et seq.*

The FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. To achieve these goals, the Secretary of Transportation is given broad power to "prescribe regulations and issue orders for every area of railroad safety." *Id.* at § 20103(a). The preemptive effect of the regulations promulgated under the FRSA is governed by the "savings and preemption clause" codified at 49 U.S.C. § 20106. Under this provision:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

Id. at § 20106. Thus states are allowed to adopt and continue in force their own laws regarding railroad safety until the Secretary of Transportation adopts regulations that cover the same subject matter. *See CSX Trans., Inc. v. Easterwood*, 507 U.S. 658, 662, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). In addition to state statutory law, under the FRSA, "[l]egal duties imposed on railroads at common law fall within the scope" of the savings and preemption clause. *Id.* at 664., 113 S.Ct. 1732 Therefore, for a state law cause of action to be preempted by federal law, there must be a showing that "federal regulations substantially subsume the subject matter of the relevant state law." *Id.*

In support of her first claim that the MDOT was negligent in failing to install automatic gates at the subject railroad crossing, Plaintiff relies on Mississippi Code Annotated Section 65-1-175. This statute grants the MDOT exclusive jurisdiction "with respect to public roadway/railroad crossings . . . except to the extent that its jurisdiction is preempted by valid federal statute, regulation or order." MISS. CODE ANN § 65-1-175. Under this statute, the MDOT:

> [S]hall have the power, upon its own motion, or upon complaint, and after having made proper investigation . . . to require the installation of adequate and appropriate luminous reflective warning signs, luminous flashing signals, crossing gates illuminated at night, or other warning devices in order to promote the health and safety of the public. . . The department shall have the authority to determine the number, type and location of such signs, signals, gates or other protective devices which shall conform as near as may generally recognized national standards, and the department shall have the authority to prescribe the division of the cost of the installation and subsequent maintenance of such signs, signals, gates or other warning devices between the rail carrier or carriers, the public highway authority in interest and the [MDOT].

Id. Additionally, under Mississippi Code Annotated Section 65-1-8(2)(f), the MDOT has the authority and duty to "require the railroad at grade crossings, where any road of the state highway system crosses the same, to place signal posts with lights or other warning devices at such crossings at the expense of the railroad." Plaintiff alleges that the MDOT breached its duties under the above referenced statutes by failing to install automatic gates at the subject crossing despite its knowledge of the existing hazardous condition. The issue before the Court is whether this claim is preempted by federal law.

The record shows that at the time of the incident, the subject railroad crossing was equipped with cantilever post-mounted automatic flashing warning lights that were installed with the use of federal funds. *See* Response, Exhibit A. The United States Supreme Court has found that in cases in which federal-aid funds have participated in the installation of warning devices at railroad crossings, states are subject to the federal regulations, set forth in 23 C.F.R. §§ 646.214(B)(3) and (4), which specify the type of warning device that must

be installed. *See CSX Trans., Inc. v. Easterwood*, 507 U.S. 658, 666, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). If the conditions enumerated in 23 C.F.R. § 646.214(B)(3), *i.e.* multiple tracks, high speed trains operating in areas of limited visibility, heavy vehicle or train traffic, or diagnostic team recommendation, are present, the state must install automatic gates and flashing lights. *See Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 354, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000). If, however, the factors enumerated in 23 C.F.R. § 646.214(b)(3) are absent, § 646.214(b)(4) "dictates that the decision as to what devices to install is subject to [Federal Highway Administration ('FHWA')] approval." *Id.* Importantly,

> [i]n either case, § 646.214(b)(3) or (4) 'is applicable' and determines the type of warning device that is 'adequate' under federal law. As a result, once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating, the regulation 'displace[s] state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained.'

Id. (quoting *Easterwood*, 507 U.S. at 670, 113 S.Ct. 1732).

As indicated above, federal funds were used to install the automatic flashing lights present at the subject railroad crossing. "The fact that federal funds participated in the installation of the warning devices legally presupposes that the Secretary [of Transportation] approved and authorized that expenditure, which in turn legally presupposes that the Secretary determined that the safety devices installed were adequate to their task." *Hester v. CSX Transp., Inc.*, 61 F.3d 382, 387 (5th Cir.1995). The Court, therefore, finds that 23 C.F.R. § 646.214(b)(3) and (4) are applicable as the FHWA approved the installation of the automatic flashing lights, the lights were "actually installed and operational, and federal funds were used to install the warning devices." *See*

Shanklin, 529 U.S. at 345, 120 S.Ct. 1467. The Court further finds that as 23 C.F.R. § 646.214(b)(3) and (4) establish a standard of adequacy for the type of warning devices to be installed at federally-funded railroad crossing, they "cover the subject matter" of the type of warning device to be installed thereby preempting state law. *See Easterwood*, 507 U.S. at 671, 113 S.Ct. 1732. *See also Shanklin*, 529 U.S. at 359, 120 S.Ct. 1467 (holding that once the FHWA approved the warning devices to be installed at a railroad crossing and the devices were installed using federal funds, "the federal standard for adequacy displaced [state] statutory and common law addressing the same subject, thereby preempting" a failure to maintain adequate warning devices claim under state law). Accordingly, the Court finds that Plaintiff's "failure to install gates" claim alleged against the MDOT, which challenges the adequacy of the warning device present at the subject railroad crossing is preempted under federal law and, therefore, that Plaintiff has no possibility of establishing a cause of action of negligence against the MDOT in state court.

Plaintiff next alleges that although the MDOT authorized and directed IRC to install automatic gates at the subject railroad crossing on or about December 19, 1999, it was negligent in failing to install the gates in a timely manner. Plaintiff, however, has not presented any evidence to show that the MDOT issued such authorization or direction. The only evidence presented on the issue of decisions made by the MDOT regarding the type of warning devices to be installed at the subject railroad crossing is the affidavit of Steven K. Edwards ("Edwards"), a Rails Division Engineer and employee of the MDOT. *See* Response, Exhibit A. In his affidavit, Edwards avers that the Mississippi State Highway Department administered a Rail Grade Protection Project in 1995 and 1996 and, as part of that project, federal funds were used to install the automatic flashing lights at the subject railroad crossing. There is no evidence in the record to show

that the MDOT reassessed the adequacy of the warning devices present at the subject crossing or decided to there install additional warning devices. The Court finds, after piercing the pleadings, that Plaintiff did not satisfy her burden of showing that the MDOT was not fraudulently joined as a defendant in this case.

The Court also finds that Plaintiff's "delay in gate installation" claim is one that essentially again challenges the adequacy of the automatic flashing lights then existing at the subject railroad crossing. The conclusion of the Court is supported by the allegations of Plaintiff that both Defendants were aware of the "extra-hazardous condition of the subject crossing," that they recognized the need to install warning devices in addition to the automatic flashing lights then present at the crossing, but that they negligently delayed the construction of adequate warning devices, *i.e.* automatic gates. *See* Complaint, ¶¶ 9-11. The Court finds, for the reasons discussed above, that this claim is preempted under federal law.

The United States Supreme Court has found that the FRSA does not prevent "a State from revisiting the adequacy of the devices installed using federal funds" and permits a state "to install more protective devices at such crossings with their own funds or with additional funding from the FHWA." *Shanklin*, 529 U.S. at 358, 120 S.Ct. 1467 (2000). However, the *Shanklin* Court also found that the issue of "[w]hether the State should have originally installed different of additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question." *Id.* States cannot, once they have installed federally funded devices at a particular crossing, hold parties responsible for the adequacy of those devices under state law. *Id.*

In the case sub judice, Plaintiff apparently alleges that the automatic warning lights at the subject railroad crossing were inadequate based on the dangerous conditions there existing.

Plaintiff further alleges that Defendants failed to correct this problem by timely implementing additional warning devices. The decision-making authority of the state, however, with regard to the type of warning device to be installed at the subject crossing is preempted by the federal regulations set forth in 23 C.F.R. § 646.214(b)(3) and (4). *See Shanklin*, 529 U.S. at 359, 120 S.Ct. 1467. *See also Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir.1996) (finding that "the issue is not what warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad's and state's hands."). As federal funds paid for the installation of the automatic warning lights present at the subject crossing, it is legally presupposed that those safety devices were adequate, *see Hester v. CSX Transp., Inc.*, 61 F.3d 382, 387 (5th Cir.1995), and the state was relieved of any duty to upgrade the crossing. *See Bock v. St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 923 (8th Cir.1999) (holding that after a federally funded warning device was installed and operational at a railroad crossing, the state was relieved of any obligation under state law to "sua sponte" upgrade that crossing); *St. Louis Southwestern Ry. Co. v. Malone Freight Lines*, 39 F.3d 864, 867 (8th Cir.1994) (finding that "[b]efore preemption, the public is protected by a railroad's state common-law duty of care. After installation of federally mandated warning devices, the public is protected by those devices."). The Court finds that as any common law duty on the part of the MDOT to install warning devices at the subject crossing in addition to those determined adequate by the FHWA is preempted, there cannot be a common law duty to timely install such additional devices. Accordingly the Court finds that Plaintiff's "negligent delay in gate installation" claim alleged against the MDOT, which again challenges the adequacy of the warning device present at the subject railroad crossing, is preempted under federal law and, therefore, that

Plaintiff has no possibility of establishing a cause of action against the MDOT on this claim in state court.

The Court finds that non-diverse Defendant the MDOT was fraudulently joined and therefore, that its citizenship should not be considered for the purpose of diversity of citizenship jurisdiction analysis under 28 U.S.C. § 1332. The Court additionally finds that as the statutory requisites for diversity of citizenship jurisdiction are satisfied, the Court has federal subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332. The Motion of Plaintiff to Remand is therefore denied.

IV. Conclusion

For the foregoing reasons:

IT IS THEREFORE ORDERED that the Motion of Plaintiffs to Remand [5-1] is hereby denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-60782

KELLI SMALLWOOD,
Plaintiff-Appellant,

v.

ILLINOIS CENTRAL RAILROAD COMPANY;
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Defendants-Appellees.

Dec. 19, 2003

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT and PRADO, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Supreme Court, U.S.
FILED
MAR 14 2005
OFFICE OF THE CLERK

No. 04-831

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY and
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Petitioners,

v.

KELLI SMALLWOOD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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March 14, 2005

QUESTION PRESENTED

Whether it is proper for a diverse defendant to allege fraudulent joinder to defeat diversity jurisdiction on grounds that can be asserted by diverse and non-diverse defendants alike.

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INTRODUCTION

The matter before the Court concerns the doctrine of fraudulent joinder to defeat diversity jurisdiction. The fraudulent joinder doctrine provides that, in cases removed from state court to federal court in diversity jurisdiction, *see* 28 U.S.C. § 1332; *Id.* § 1441, the citizenship of diversity-defeating defendants can be disregarded in limited circumstances.[1] Specifically, the citizenship of a non-diverse defendant will be disregarded when there has been outright fraud in the pleading of jurisdictional facts or when there is no possibility that a plaintiff can establish a claim for relief against a non-diverse defendant under relevant state law. *See generally* James F. Archibald III, Note, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 Va. L. Rev. 1377, 1387 (1992) (collecting cases).

The core principles of the fraudulent joinder doctrine were enunciated by the Court in a handful of decisions issued almost a century ago. A defendant is fraudulently joined when that defendant has "no real connection with the controversy." *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152 (1914). Correspondingly, fraudulent joinder does not exist where "[t]here is nothing more than a traverse of the cause of action" against a non-diverse defendant, and in such a case "the plaintiff has a right of action under the law of the state and to insist upon [the non-diverse defendant's] presence as a real defendant." *Chicago, Rock Island & Pac. Ry. Co. v. Whiteaker*, 239 U.S. 421, 425 (1915). *See also Huffman v. Baldwin*, 82 F.2d 5, 8 (8th Cir. 1936) (when allegations of fraudulent joinder

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1. As the Court knows, diversity jurisdiction generally requires complete diversity of citizenship, that is, no plaintiff can be a citizen of the same state as any defendant. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)).

amount to a "general denial" of wrongdoing that "affect[s] all defendants" and "involve[s] the merits of the controversy," such allegations "ha[ve] no tendency to show any fraudulent joinder of resident defendants to prevent removal").[2] Put another way, when a claim of fraudulent joinder merely "indicate[s] that the plaintiff's case [is] ill founded as to [both diverse and non-diverse] defendants," it goes to "the merits of the [cause of] action . . . and not to the joinder." *Cockrell*, 232 U.S. at 153.

In the more than eighty years that have passed since the Court last squarely addressed the subject of fraudulent joinder, *see Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 96-99 (1921), the contours of the doctrine have blurred and its scope has expanded dramatically. It is now commonplace for federal courts to find fraudulent joinder based on what amounts to a traverse of a plaintiff's cause of action, that is, an allegation of fraudulent joinder that simply attacks the merits of the plaintiff's claim for relief against diverse and non-diverse defendants alike. *See, e.g., Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 268 n.3 (5th Cir. 2001) (holding that a non-diverse defendant was fraudulently joined because the plaintiffs' claims against that defendant were preempted by the Texas products liability statute; the court conceded that the same grounds for fraudulent joinder also were dispositive of the plaintiffs' claims against the removing defendants as well, but

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2. In common-law pleading, when a defendant denied a plaintiff's allegations this was termed a "traverse" of those allegations. *See McGann v. Kelly*, 891 F. Supp. 128, 131 n.1 (S.D.N.Y. 1995). A "cause of action" is of course the "group of operative facts giving rise to one or more bases for suing" or, differently put, "a factual situation that entitles one person to obtain a remedy in court from another person." Black's Law Dictionary (8th ed. 2004). It is the ancestor of the modern "claim for relief." Fed. R. Civ. P. 8(a). *See also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216 (2004).

insisted, "[T]he jurisdictional question is inseparable from the merits.").

The en banc decision of the court below refused to permit Petitioner Illinois Central Railroad Company ("ICR") to assert fraudulent joinder on the grounds that the claims of Respondent Kelli Smallwood against Petitioner Mississippi Department of Transportation ("MDOT") are preempted by federal law, a defense equally available to both ICR and MDOT. Contrary to the arguments of ICR and MDOT in support of a grant of a writ of certiorari, the decision of the court below is not in conflict with decisions of this Court or decisions from sister circuits. Instead, the decision of the court below is an important and valuable step toward restoring judicial federalism by recovering the true meaning of the fraudulent joinder doctrine as set forth in the decisions of this Court.

STATEMENT OF THE CASE

This case arises from a collision between a car driven by Ms. Smallwood and a train owned and operated by ICR at a railroad crossing in Florence, Mississippi. Ms. Smallwood filed suit for negligence against ICR and MDOT in the Circuit Court of Hinds County, Mississippi. *See Smallwood v. Illinois Cent. R.R. Co.*, 342 F.3d 400, 401 (5th Cir. 2003). She alleged that the signalization at the Florence crossing was inadequate because MDOT negligently failed to install automatic gates at the crossing. *See id.* Ms. Smallwood alleged also that, after approval of federal funds for automatic gates at the Florence crossing by the Federal Highway Administration, both ICR and MDOT negligently failed to install the gates at the crossing within a reasonable time. *See id.*

ICR removed the case to the United States District Court for the Southern District of Mississippi in diversity jurisdiction, contending that MDOT, a non-diverse party, had been fraudulently joined to defeat diversity jurisdiction. *See Smallwood*, 342 F.3d at 401-02.[3] ICR asserted that Ms. Smallwood could establish no claim against MDOT under Mississippi law because her claims against the agency are conflict-preempted by the Federal Railroad Safety Act of 1970, 49 U.S.C. §§ 20101-20153 ("FRSA"). *See* 342 F.3d at 401-02.[4] Ms. Smallwood moved for remand of her case to state court. *See id.* at 402.

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3. MDOT, as an alter ego of the State of Mississippi, is not a citizen of a state for diversity purposes. *See Moor v. County of Alameda*, 411 U.S. 693, 717 (1973); *Tradigrain, Inc. v. Mississippi State Port Auth.*, 701 F.2d 1131, 1132 (5th Cir. 1983); *Brady v. Michelin Reifenwerke*, 613 F. Supp. 1076, 1078-79 (S.D. Miss. 1985).

4. As the Court knows, "conflict preemption" occurs when federal law extinguishes a plaintiff's state-law claim. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). This is in contrast of course to "complete preemption," wherein a federal remedy completely displaces any remedy under state law so as to permit removal of a claim nominally brought under state law to federal court pursuant to 28 U.S.C. §§ 1331 and 1441. *See Taylor*, 481 U.S. at 63-64. *See also Rivet v. Regions Bank of La.*, 522 U.S. 470, 475-76 (1998). The only basis for federal subject matter jurisdiction that ICR has ever asserted in this case is diversity; at no time has ICR asserted that the FRSA completely preempts state law so as to permit removal. *See* 14C Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Joan E. Steinman, *Federal Practice & Procedure* § 3733 (1998 & Supp. 2004) (explaining that under 28 U.S.C. § 1653 a notice of removal cannot be amended to allege an entirely new basis for federal jurisdiction more than thirty days after removal) (collecting cases). Also, the issue of whether the FRSA completely preempts state law is not properly before the Court because it was not passed on by the court below, *see FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298 n.4 (1960), and because it is not within the scope of the question presented by the petition for a writ of certiorari currently before the Court. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431-32 (1997).

The district court denied remand, finding that MDOT had been fraudulently joined due to FRSA preemption of Ms. Smallwood's claims against the agency. *See Smallwood*, 342 F.3d at 402. Thereafter, the district court granted summary judgment for ICR on grounds of FRSA preemption. *See id.* In so doing, the district court concluded that, in view of its holding that Ms. Smallwood's claims against MDOT are preempted, it was bound by the "law-of-the-case" doctrine to find that the her claim against ICR is preempted as well. *See Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 572, 574 (5th Cir. 2004).[5]

On appeal a panel of the United States Court of Appeals for the Fifth Circuit vacated the district court's judgment and ordered the district court to remand Ms. Smallwood's case to state court for lack of subject matter jurisdiction. *See Smallwood*, 342 F.3d at 402, 408. The panel held that ICR's claim of fraudulent joinder "manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." *Id.* at 404 (quoting *Cockrell*, 232 U.S. at 153). The panel held further, "[W]here there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses." *Id.* at 405 (quoting *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 113 (3d Cir. 1990)). "Instead, that is a merits determination which must be made by the state court." *Id.* Accordingly, the panel rejected ICR's attempt to assert fraudulent joinder on grounds

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5. The "law-of-the-case" doctrine provides of course that a court, once having decided an issue, generally will decide the issue the same way at all later stages of a proceeding. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-17 (1988).

that could be asserted by diverse and non-diverse defendants alike. *See id.* at 408.

On December 19, 2003, the court of appeals ordered rehearing en banc in Ms. Smallwood's case. *See Smallwood v. Illinois Cent. R.R. Co.*, 355 F.3d 357, 357-58 (5th Cir. 2003). On September 10, 2004, the en banc court of appeals upheld the panel's decision and rejected ICR's claim of fraudulent joinder based on grounds that could be asserted by both ICR and MDOT, the diversity-defeating party. The en banc court said, "The doctrine of improper joinder . . . entitle[s] a defendant to remove to a federal forum unless an in-state defendant has been 'properly joined.' Since the purpose of the improper joinder inquiry is to determine whether or not the in-state defendant was properly joined, the focus of the inquiry must be on the joinder, not the merits of the plaintiff's case." *Smallwood*, 385 F.3d at 573.[6]

The court held, "A claim of improper joinder by

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6. In *Smallwood* the en banc court eschewed the traditional term "fraudulent joinder" in favor of the term "improper joinder." *See* 385 F.3d at 571 & n.1. Where the removal statute authorizes removal of any action in which "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought," 28 U.S.C. § 1441(b), the court reasoned that the term "improper joinder" is more consistent with the statutory language. *See* 385 F.3d at 571 n.1. *See also Lewis v. Time Inc.*, 83 F.R.D. 455, 460 (E.D. Cal. 1979) (explaining that the term "fraudulent joinder" is something of a misnomer: "'Fraudulent joinder' is a term of art, it does not reflect on the integrity of plaintiff or counsel but is merely the rubric applied when a court finds either that no cause of action is stated against the nondiverse defendant, or in fact no cause of action exists.") (citation omitted). However, the en banc court advised that there is "no substantive difference" between the terms "fraudulent joinder" and "improper joinder." 385 F.3d at 571 n.1. This brief employs the term "fraudulent joinder," in deference to the Court's decisions concerning the doctrine.

definition is directed toward the joinder of the in-state party, a simple but easily obscured concept. The party seeking removal bears a heavy burden of proving that the joinder of the in-state party was improper." *Smallwood*, 385 F.3d at 574. The court continued,

> [W]hen, on a motion to remand, a showing that compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no improper joinder; there is only a lawsuit lacking in merit. In such cases, it makes little sense to single out the in-state defendants as "sham" defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such – an allegation that . . . "the plaintiff's case [is] ill founded as to all the defendants."

Id. (quoting *Cockrell*, 232 U.S. at 153).

The en banc court held that "the basis of [ICR's] contention that Smallwood could not recover went, in fact, to the entire case, although it was first directed to Smallwood's claims against MDOT. Then, with jurisdiction secured, and with all the force of the 'law of the case,' this same preemption was directed to the merits of Smallwood's claims against the railroad." *Smallwood*, 385 F.3d at 574. However, the court went on to say, "[T]he burden on the removing party is to prove that the joinder of the in-state parties was improper – that is, to show that sham defendants were added to defeat jurisdiction. A showing that the plaintiff's case is barred as to all defendants

is not sufficient." *Id.* at 575.[7] Finding that ICR's claim of fraudulent joinder based on FRSA preemption of Ms. Smallwood's claims against MDOT was "equally dispositive of all defendants," the en banc court held "diversity is not complete" and ordered Ms. Smallwood's case remanded to state court for lack of jurisdiction. *Id.* at 575, 576.

ARGUMENT

I. The Decision of the Court Below Is Consistent with Precedent of this Court.

This Court has long held, as the court below did, that fraudulent joinder is not established merely by attacking the merits of a plaintiff's claim for relief against diverse and non-diverse defendants alike. Such determinations are for a state court to make. Instead, fraudulent joinder is proven by showing that a plaintiff cannot recover against a non-diverse defendant because that defendant has no connection to a controversy.

In *Southern Railway Co. v. Lloyd*, 239 U.S. 496 (1916), the Court rejected a claim of fraudulent joinder that amounted merely to an assertion that the plaintiff could not establish a claim under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ("FELA"), against a non-diverse defendant, a contention that, if true, was equally dispositive of the plaintiff's claim against the defendant seeking removal. *Lloyd* was a suit

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7. The en banc court offered examples of certain kinds of facts that, if proved by summary evidence, establish fraudulent joinder: "For example, the in-state doctor defendant did not treat the plaintiff patient, the in-state pharmacist defendant did not fill a prescription for the plaintiff patient, a party's residence was not as alleged, or any other fact that easily can be disproved if not true." *Smallwood*, 385 F.3d at 574 n.12.

under FELA by a railroad engineer who was injured on the job against his employer, the Southern Railway Company ("Southern"), and the North Carolina Railroad Company, from which Southern had leased the track where the plaintiff was injured. *See* 239 U.S. at 497-98. Southern attempted to remove the case to federal court, asserting that the plaintiff could establish no claim under FELA against the North Carolina Railroad Company, which defeated diversity, because the plaintiff was not engaged in interstate commerce when he was injured and thus had no claim against the lessor railroad under FELA. *See id.* at 498-99. The Court found that Southern had failed to show fraudulent joinder. "In no case can the right of removal be established by a petition to remove which amounts simply to a traverse of the facts alleged in the plaintiff's petition, and in that way undertaking to try the merits of a cause of action, good upon its face." *Id.* at 500.

In *Chesapeake & Ohio Railway Co. v. Cockrell* the Court rejected a claim of fraudulent joinder in a wrongful death suit against a railroad company and two non-diverse agents of the railroad, an engineer and a fireman, who were alleged negligently to have killed a woman at a railroad crossing. *See* 232 U.S. at 150. The railroad attempted to remove the case to federal court. The railroad's petition for removal, the Court noted, "[did] not deny[ ] that the engineer and fireman were in the employ of the company, or that they were operating the train when it struck and injured the intestate." *Id.* at 150-51. However, the railroad insisted that the plaintiff's allegations of negligence against the non-diverse defendants were "false and untrue" and that "none of the charges of negligence on the part of the engineer or fireman could be sustained on the trial." *Id.* at 151. The Court observed that the railroad's allegations, if true, "may have disclosed an absence of good faith on the part of the plaintiff in bringing the action at all." *Id.* at 153. However, the Court continued, they "did not show a fraudulent

joinder of the engineer and fireman." *Id.*

Because the railroad had failed to present any evidence that the engineer and fireman were not operating the train when the accident took place, the Court found that the railroad had failed to show fraudulent joinder. "With the allegation that [the engineer and fireman] were operating the train which did the injury standing unchallenged, the showing amounted to nothing more than a traverse of the charges of negligence, with an added statement that they were falsely or recklessly made and could not be proved as to the engineer or fireman." *Cockrell*, 232 U.S. at 153. The Court concluded that "this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them." *Id.* The Court held, "As [the engineer and fireman] admittedly were in charge of the movement of the train, and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky [where the accident took place], to insist upon their presence as real defendants as upon that of the railway company." *Id.* "We conclude, therefore, that the petition for removal was not such as to require the state court to surrender its jurisdiction." *Id.* at 153-54.[8]

Finally, in *Illinois Central Railroad Co. v. Sheegog*, 215 U.S. 308 (1909), the Court again rejected a claim of fraudulent joinder that amounted merely to a traverse of a plaintiff's cause of action against diverse and non-diverse defendants. In *Sheegog* the estate of a railroad engineer killed in a train derailment accident brought suit for negligence against ICR, the

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8. Until 1948 removal was effected by petitioning the state court in which an action was pending for leave to remove the action to federal court. *See generally* 20 Charles Alan Wright & Mary Kay Kane, *Federal Practice & Procedure Deskbook* § 42 (2002).

engineer's employer. *See id.* at 315. Also named as defendants were the Chicago, St. Louis, and New Orleans Railroad Company, from which ICR leased the track where the derailment occurred, and the conductor of the train on which the engineer was working when he was killed. *See id.* The plaintiff alleged that the lessor railroad and the lessee railroad had been negligent in maintaining the roadbed and track where the derailment occurred. *See id.* The plaintiff alleged also that the derailment had occurred because ICR had been negligent in maintaining its train and in operating the train on tracks that were in disrepair, and that the conductor had been negligent in ordering and directing the management of the train. *See id.*

ICR sought to remove the case, contending that the lessor railroad and the conductor, both of whom defeated diversity, had been fraudulently joined. The court concluded that ICR had failed to show fraudulent joinder as to the lessor railroad. The Court observed that ICR's petition for removal "admitted the lease" but asserted that "the charge of joint negligence against the lessor and lessee in causing the wreck . . . was fraudulent and knowingly false." *Sheegog*, 215 U.S. at 315. However, the Court noted, as a matter of law a lessor is jointly liable for injury caused through the negligence of a lessee. *See id.* at 317-18. Thus, the Court concluded, to hold that the plaintiff's claim for relief against the lessor railroad was fraudulent would be tantamount to holding "that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false." *Id.* at 316. *See also Whiteaker*, 239 U.S. at 423-25 (in a suit against a railroad company and a conductor for injuries suffered when the conductor threw the plaintiff off a moving train, rejecting the railroad's argument that the conductor was fraudulently joined because he was elsewhere on the train when the injury giving

rise to the case occurred).[9]

The meaning of the Court's fraudulent joinder jurisprudence is that a defendant cannot establish fraudulent joinder by controverting the merits of a plaintiff's claim for relief. By the same token, the Court has held that fraudulent joinder can be proven through summary evidence showing that a non-diverse defendant has no real connection to a controversy. For example, in *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176 (1907), a plaintiff sued his employer, the National Enameling and Stamping Company ("National"), and a non-diverse co-employee, George Wettengel, for injury caused by a machine that allegedly was defectively designed. *See id.* at 178-79. National asserted that Wettengel was fraudulently joined and submitted in support of the claim uncontradicted affidavits by Wettengel and the chief engineer of the company showing that Wettengel was merely a draftsman with no responsibility for designing the machine that caused the injury at issue in the case. *See id.* at 183-84. The Court said, "[i]n view of this testimony and the apparent want of basis for the allegations of the [removal] petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think . . . he was joined for the purpose of defeating the right of the corporation

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9. It is important to note that in both *Lloyd* and *Sheegog* the defendants who were found to defeat diversity were not agents of the defendant seeking removal. In fact, in *Sheegog* the Court pointed out that the plaintiff's claim against the conductor likely was barred by the "fellow-servant" rule, the common-law doctrine that an employer is not liable for an employee's injuries caused by a negligent co-worker, although the Court did not reach the issue because, for the reason discussed supra, it was unnecessary to do so. *See* 215 U.S. at 317. Thus, in this case ICR and MDOT are wrong in arguing that fraudulent joinder cannot be asserted on grounds common to diverse and non-diverse defendants only in those cases where the liability of the defendant seeking removal is vicarious.

to remove the case to the Federal court." *Id.* at 185. *See also Wilson*, 257 U.S. at 94, 96-98 (in a suit for personal injuries by a plaintiff against his employer and a non-diverse co-employee, holding that the case was properly removed to federal court where the plaintiff failed to controvert allegations in a verified removal petition that the co-employee "was not present when the plaintiff's injuries were received, and did no act or deed which caused or contributed to such injuries").

In this case ICR never argued or produced evidence to show, for example, that MDOT does not exist or that, if it does exist, the agency has no responsibility for safety devices at railroad crossings in Mississippi. Instead, ICR merely argued that Ms. Smallwood's claims against MDOT are preempted by the FRSA. Whatever the merits of ICR's preemption argument, it is not a proper basis for a claim of fraudulent joinder. As the court below held, "When the only proffered justification for [fraudulent] joinder is that there is no reasonable basis for predicting recovery against the in-state defendant, and that showing is equally dispositive of all defendants rather than to the in-state defendants alone, the requisite showing has not been made." *Smallwood*, 385 F.3d at 575.

II. There Is No Circuit Split on the Question Presented.

The decision of the court below does not conflict with *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998), and *LeBlang Motors, Ltd. v. Subaru of America, Inc.*, 148 F.3d 680 (7th Cir. 1998), as ICR and MDOT argue. In *Ritchey* the court recognized the general rule established by *Cockrell* and other precedent of this Court discussed supra that a claim of fraudulent joinder cannot be based on grounds that can be asserted by diverse and non-diverse defendants alike. However, the *Ritchey* court concluded that because under California law

the statute of limitations is a unique defense that does not address the merits of a plaintiff's claim, it does not violate the strictures of *Cockrell* for a defendant to assert fraudulent joinder based on a California limitations defense applicable to claims against diverse and non-diverse defendants alike. As for *LeBlang*, in that case the issues presented by Ms. Smallwood's appeal were not briefed, argued, or considered by the court, and thus *LeBlang* is not precedential as those issues.

Turning first to *Ritchey*, in that case the court recognized that "[t]here is a distinction" between a complete lack of a claim against allegedly fraudulently-joined defendants and "an inquiry as to whether those defendants could propound defenses to an otherwise valid cause of action." 139 F.3d at 1318. In the latter instance, the court acknowledged, the claim of fraudulent joinder goes to "the merits of the action as an entirety, and not to the joinder; that is to say, it indicate[s] that the plaintiff's case [is] ill founded as to all the defendants." *Id.* (quoting *Cockrell*, 232 U.S. at 153). *See also Murakami v. E.I. DuPont De Nemours & Co.*, 191 F.3d 460, 1999 WL 701902, at *3 (9th Cir. 1999); *Lovell v. Bad Ass Coffee Co. of Haw.*, 103 F. Supp. 2d 1233, 1237 (D. Haw. 2000). However, the *Ritchey* court concluded, under California law a limitations defense does not address the merits of a case. The court said, "California has emphasized the fact that the statute of limitations is a kind of procedural bar, and not one which relates to the merits of the case." 139 F.3d at 1319 (citing, inter alia, *Piazza Props., Ltd. v. Department of Motor Vehicles*, 138 Cal. Rptr. 357, 360 (Cal. Ct. App. 1977)). "In fact, California has pointed out that a judgment based on the statute of limitations regarding a cause of action in one suit is not necessarily res judicata in a second suit, which pleads a different cause of action based on the same core of underlying facts." *Id.* (citing *Koch v. Rodlin Enters.*, 273 Cal. Rptr. 438, 441-42 (Cal. Ct. App. 1990)).

The principle the *Ritchey* court invoked is of course simply the common-law rule that a statute of limitations runs against a remedy, not a right, so that the running of a limitations period does not necessarily preclude a new suit to enforce the right. "The general rule is that a statute of limitations bars, or runs against, the remedy and does not extinguish or impair the right, obligation, or cause of action." 54 C.J.S. *Limitations of Actions* § 11 (1955 & Supp. 2004) (collecting cases). *See also Koch*, 273 Cal. Rptr. at 441-42 (a dismissal on limitations grounds by a foreign court is not res judicata in a new action to enforce the same legal right in California court); *Piazza Props.*, 138 Cal. Rptr. at 360 (noting that "[a] statute of limitations typically is procedural only, affecting the remedy, not the substantive right or obligation").[10]

In sum, *Ritchey* does not conflict with the decision of the court below. The *Ritchey* court recognized the general rule that fraudulent joinder cannot be asserted on grounds that can be asserted by diverse and non-diverse defendants alike. However, the court created an exception to that rule based on what it saw as the unique nature of a statute of limitations defense under California law. The court below seems to have

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10. The *Ritchey* court seems also to have relied upon the principle that the statute of limitations is a defense personal to a party entitled to plead it and thus can be waived if not pleaded. *See* 139 F.3d at 1319 (citing *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), and *O'Neil v. Spillane*, 119 Cal. Rptr. 245, 252 (Cal. Ct. App. 1975)). In fact, it is precisely because a limitations defense is personal to the defendant entitled to plead it that such a defense cannot be asserted by a defendant on behalf of a co-defendant. *See Goldberg, Bowen & Co. v. Demick*, 247 P. 261, 263 (Cal. Dist. Ct. App. 1926). *See also* 51 Am. Jur. 2d *Limitation of Actions* § 69 (1964 & Supp. 2004) ("A plea of the statute of limitations is a personal defense, and generally cannot be asserted for someone else.") (footnote omitted) (collecting cases). Thus, under California law, in *Ritchey* the removing defendant was not entitled to assert a defense of the statute of limitations on behalf of non-diverse co-defendants.

believed mistakenly that its en banc decision is in conflict with the *Ritchey* decision. *See Smallwood*, 385 F.3d at 575 n.21. However, this misapprehension is merely a commentary upon the tortured and byzantine reasoning of the *Ritchey* court. *See Ritchey*, 139 F.3d at 1320 (admitting that the result in that case is "anomal[ous]" and "peculiar"). *See also Shadie v. Aventis Pasteur, Inc.*, 254 F. Supp. 2d 509, 519 (M.D. Pa. 2003) (stating that *Ritchey* is "not persuasive"). In any event, whatever the merits of the *Ritchey* court's reasoning, its decision does not establish the existence of a circuit split.

Finally, *LeBlang* does not conflict with the decision of the court below. In *LeBlang*, an action for fraud by a former automobile dealer against an automobile manufacturer and two of the manufacturer's employees, the court found that the employees, who defeated diversity, had been fraudulently joined because the statute of limitations had run on the plaintiff's claim against the employees. *See* 148 F.3d at 690-92. The limitations period applicable to the plaintiff's claims against the employees was the same as the limitations period applicable to the plaintiff's claims against the manufacturer. *See id.* at 690. ICR and MDOT claim that *LeBlang* "implicitly" conflicts with the decision of the court below. What ICR and MDOT mean of course is that nothing in the *LeBlang* decision or in the briefing by the parties to *LeBlang* addresses the issues presented by Ms. Smallwood's appeal.[11] Thus, *LeBlang* is not a precedent as to those issues and is not in conflict with the decision of the court below.

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11. The brief of the appellants and the reply brief of the appellants in *LeBlang* are available on Westlaw at 1997 WL 33623408 and 1997 WL 33623409, respectively. As the briefing from *LeBlang* shows, the issues briefed and argued in Ms. Smallwood's appeal were not briefed and argued in *LeBlang*.

As the Court knows, a judicial opinion never decides an issue "implicitly." "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925)). *See also United States v. Mitchell*, 271 U.S. 9, 14 (1926) ("It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered."); *United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990) ("Judicial assumptions concerning, judicial allusions to, and judicial discussions of issues that are not contested are not holdings.").

The rule that a judicial opinion is authority only for those issues that it actually decides applies with particular force when an issue is, as in this case, jurisdictional. "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984) (quoting *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974)). Simply put, "drive-by jurisdictional rulings . . . have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). *See also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994) (decisions in which the Court's jurisdiction was not challenged are not precedent as to a jurisdictional question, and when the question is squarely presented to the Court it may be treated as open); *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805) ("No question was made, in [a prior] case, as to . . . jurisdiction. It passed *sub silentio*, and the court does not consider itself as

bound by that case."); *Glidden v. Chromalloy Am. Corp.*, 808 F.2d 621, 625 (7th Cir. 1986) ("When a court resolves a case on the merits without discussing its jurisdiction to act, it does not establish a precedent requiring similar treatment of other cases once the jurisdictional problem has come to light.").

Thus, *LeBlang* is not a precedent as to the issues presented by Ms. Smallwood's appeal. Indeed, as *Daniels* and *Glidden* make clear, at such time as the issues presented by Ms. Smallwood's appeal are squarely presented to the United States Court of Appeals for the Seventh Circuit, that court will not treat *LeBlang* as a precedent as to those issues. Accordingly, *LeBlang* does not establish the existence of a circuit split with respect to the decision of the court below. Neither *Ritchey* nor *LeBlang* are in conflict with the en banc decision of the court below.[12]

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12. For the foregoing reasons it should be clear that, contrary to what ICR and MDOT argue, there is no conflict between, on the one hand, *Ritchey* and *LeBlang* and, on the other hand, the decision of the United States Court of Appeals for the Third Circuit in *Boyer v. Snap-on Tools Corp.* To the extent ICR and MDOT argue that the en banc court's decision contravenes earlier Fifth Circuit authority, they are wrong. As the court below recognized in its en banc decision, the issues presented by Ms. Smallwood's appeal were never considered before by the court below, so that, as with *LeBlang*, prior decisions of the court are not precedential as to those issues. *See Smallwood*, 385 F.3d at 575. In any event, it certainly is within the power of a federal court of appeals sitting en banc to overrule its own precedents in order to ensure consistency of the court's decisions with those of this Court. *See United States v. Zuniga-Salinas*, 952 F.2d 876, 877-78 (5th Cir. 1992). Of course, given the deep division in the court below as to the result in Ms. Smallwood's case (seven of the sixteen judges who heard the case en banc dissented, turning in no fewer than three written dissents), it is questionable to what degree, if any, the en banc *Smallwood* decision has clarified the law. *See Gilliard v. Oswald*, 557 F.2d 359, 359 (2d Cir. 1977) (Kaufman, C.J., concurring) (observing that "[t]he proliferation of opinions which is not rare in an en banc decision . . . usually obfuscates rather than clarifies.").

III. The Decision of the Court Below Is Consistent With Principles of Judicial Federalism.

The decision of the court below is in harmony with this Court's precedent and with the decisions of sister courts of appeals. A determination about the merits of Ms. Smallwood's claims for relief is one that only a state court can make. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). *See also Smallwood*, 385 F.3d at 576 ("When a defendant removes a case to federal court on a claim of [fraudulent] joinder, the district court's first inquiry is whether the removing party has carried its heavy burden of proving that the joinder was improper. Indeed, until the removing party does so, the court does not have the authority to do more; it lacks the jurisdiction to dismiss the case on its merits. It must remand to the state court.").

The en banc court's decision is consistent also with the policies traditionally grouped under the rubric of judicial federalism. The federal courts are courts of limited jurisdiction, and removal of cases in diversity jurisdiction must be construed narrowly to ensure that the proper balance of federal-state power is maintained. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002); *Snyder v. Harris*, 394 U.S. 332, 340 (1969); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Healy v. Ratta*, 292 U.S. 263, 270 (1934). *See also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (the Court recognizes a "presumption of concurrent [state and federal] jurisdiction," which can be rebutted only "by an explicit statutory directive, by

unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests"). The primary mission of the federal courts is to adjudicate matters involving federal law and national interests, not state law and local interests, and the limited resources of the federal judiciary are to be husbanded toward fulfillment of that mission. Limitation of diversity jurisdiction "reliev[es] the federal courts of the overwhelming burden of . . . business that intrinsically belongs to the state courts . . . in order to keep them free for their distinctive federal business." *City of Indianapolis v. Chase Nat'l Bank of City of N.Y.*, 314 U.S. 63, 76 (1941). *See also* Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, 166 F.R.D. 49, 66 (1995) ("The federal courts have served the nation well because they are special purpose courts, designed and equipped to adjudicate small numbers of disputes involving important national interests.").

As the *Smallwood* panel recognized in denying panel rehearing, the judicially-crafted doctrine of fraudulent joinder was never intended to be anything but a "narrow exception" to the complete diversity rule. *See Smallwood v. Illinois Cent. R.R. Co.*, 352 F.3d 220, 222 (5th Cir. 2003). Unfortunately, fraudulent joinder has expanded very far beyond its proper contours, with all of the harm and waste that any such unwarranted expansion of federal judicial power entails. *See, e.g., McKee v. Kansas City S. Ry. Co.*, 358 F.3d 329, 335-37 (5th Cir. 2004) (in a suit arising from a car-train collision against a railroad company and its employees who were operating the train at the time of the accident, holding after a full trial on the merits resulting in a jury verdict for the railroad that the case had to be remanded to state court; the trial judge erroneously held that the railroad's employees were fraudulently joined because they were not negligent, an assertion that "essentially attacked McKee's case in general[,]

not the joinder of the train crew").[13]

The decision of the court below represents a valuable and long-overdue attempt to clarify the fraudulent joinder doctrine, and to confine it within its proper limits as set forth in this Court's decisions. *See Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691, 694 n.2 (N.D. Miss. 2004) (noting that "the intent of the [en banc *Smallwood* decision] was obviously to fundamentally restate, in certain important respects, the very nature of the [fraudulent] joinder doctrine."). It is emblematic of the confusion surrounding the fraudulent joinder doctrine that even the court below, after a brief moment of clarity in *Smallwood*, has lapsed once more into loose construction of the doctrine. In the short time since the en banc *Smallwood* decision was issued, the court below has issued two decisions that conflict with *Smallwood* and the precedent of this Court upon which *Smallwood* relies, as well as with authority from sister circuits like *Boyer* and *Ritchey*. *See Rainwater v. Lamar Life Ins. Co.*, 391 F.3d 636, 638-39 (5th Cir. 2004) (holding that fraudulent joinder can be found on grounds common to diverse and non-diverse defendants provided at least one claim in a case is directed solely against a diverse defendant); *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 462-67 (5th Cir. 2003), *reh'g en banc denied* (Jan. 25, 2005) (finding fraudulent joinder based on a limitations defense common to diverse and non-diverse defendants alike, as well as on the supposed legal

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13. Precisely because claims of fraudulent joinder have become the subject of extraordinarily protracted proceedings in the district courts of the Fifth Circuit, the en banc *Smallwood* court warned trial judges to limit the time and resources they devote to evaluating fraudulent joinder claims. Resolving such claims, the court instructed, "should not entail substantial hearings" and "[d]iscovery by the parties should not be allowed except on a tight judicial tether, sharply tailored to the question at hand, and only after a showing of its necessity." *Smallwood*, 385 F.3d at 574.

insufficiency of the plaintiffs' claims of fraud).[14] *See also Adams v. Duff*, 2004 WL 3103778, at **2-7 (E.D. Ky. Dec. 8, 2004) (declining to follow *Smallwood*); Note, *Fifth Circuit Establishes "Common Defense" Exception to Fraudulent Joinder Doctrine*, 118 Harv. L. Rev. 1086, 1093 (2005) (disagreeing with *Smallwood*). *Compare In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d 288, 299-304 (D. Mass. 2004) (following the *Smallwood* panel's decision); *Simmons v. Norfolk S. Ry. Co.*, 324 F. Supp. 2d 914, 916 (S.D. Ill. 2004) (same).

The en banc *Smallwood* decision is a much-needed step toward restoring the proper balance of authority as between federal and state courts, and toward freeing federal courts to use their limited time and resources to carry out their unique judicial role, not to serve as a spare set of state courts presiding over a never-ending stream of cases brought to a federal forum through illegitimate claims of fraudulent joinder.

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14. A petition for a writ of certiorari will be filed in *Ross*. In *Collins v. American Home Products Corp.*, a case in which under the authority of the en banc *Smallwood* decision a panel of the United States Court of Appeals for the Fifth Circuit rejected a claim of fraudulent joinder to defeat diversity, *see Collins v. American Home Prods. Corp.*, 343 F.3d 765 (5th Cir. 2003), *reh'g & reh'g en banc denied* (Oct. 4, 2004), a petition for a writ of certiorari has been docketed as *American Home Products Corp. v. Collins*, No. 04-674 (U.S. filed Nov. 12, 2004). The holding of the court below in *Ross* cannot be justified on the basis of the Ninth Circuit's decision in *Ritchey*. In contrast to California law as expounded in *Ritchey*, under Mississippi law the expiration of a Mississippi limitations period operates to extinguish substantive rights as well as to cut off any remedy. *See* Miss. Code Ann. § 15-1-3; *Proctor v. Hart*, 16 So. 595, 596 (Miss. 1895). Mississippi adheres also to the general rule that, as discussed supra at footnote 10, a defense based upon a statute of limitations is personal to the defendant entitled to plead it and cannot be set up on that person's behalf by another. *See Lewis v. Buckley*, 19 So. 197, 198 (Miss. 1895).

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

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ILLINOIS CENTRAL RAILROAD COMPANY and MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Petitioners,

v.

KELLI SMALLWOOD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

Respondent correctly points out that (i) "more than eighty years . . . have passed since the Court last squarely addressed the subject of fraudulent joinder," Opp. 2; (ii) since that time, "the contours of the doctrine have blurred and its scope has expanded dramatically," *id.*; (iii) it is "commonplace for federal courts to find fraudulent joinder based on . . . an allegation . . . that simply attacks the merits of the plaintiff's claim for relief against diverse and non-diverse defendants alike," *id.*; and (iv) there is "confusion surrounding the . . . doctrine." *Id.* at 21. Together, these admissions – the long interlude without this Court's guidance and the resulting confusion about an important rule of federal procedure – add up to a strong case for this Court's review.

Although respondent argues at length that the decision below does not conflict with decisions of this Court or other courts of appeals, her brief reflects the current conflict by describing the lower courts' expansion of and confusion about this Court's fraudulent-joinder jurisprudence. The lower courts are, in fact, divided about the appropriate fraudulent-joinder test to derive from this Court's precedents, and have adopted conflicting tests. And, as a recent comment makes clear, the decision below misapplies this Court's cases and embraces a rule that is both wrong and damaging. See *Recent Cases*, 118 Harv. L. Rev. 1086, 1090-93 (2005).

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE COURTS OF APPEALS.

A. The Circuits Are In Conflict.

The traditional test for fraudulent joinder is "whether the defendant has demonstrated that there is no possibility of

recovery by the plaintiff against an in-state defendant." App. 5a. There is no "common defense" exception to this rule when there is no possibility of recovery against the out-of-state defendant for the same reason. Instead, it was the Third Circuit that in 1990 – 70 years after this Court last addressed fraudulent joinder – discovered the "common defense" exception to the fraudulent-joinder rule. See *Boyer* v. *Snap-On Tools Corp.*, 913 F.2d 108, 113 (3d Cir. 1990). The court below expressly followed the Third Circuit's lead, rejecting the contrary position of the Ninth Circuit. See App. 9a & n.24. Notwithstanding her admission that it is "commonplace for federal courts to find fraudulent joinder based on an . . . allegation . . . that simply attacks the merits of the plaintiff's claim for relief against diverse and non-diverse defendants alike," Opp. 2, respondent inconsistently insists that the "common defense" rule does not conflict with decisions of other circuits. This changeable rhetoric does not alter reality.

First, the Fifth Circuit itself cited *Ritchey* v. *Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998), as reflecting the Ninth Circuit's refusal to read this Court's decisions as the Fifth and Third Circuits had. App. 9a n.24. See also *id.* at 48a n.49 (*Ritchey* "supports [defendants'] argument. There the Ninth Circuit found fraudulent joinder because the claims against the nondiverse defendants were barred by the statute of limitations. It did so despite the fact that the same statute of limitations defense applied to bar the claim against the diverse defendant.") (citation omitted). Clearly, the Fifth Circuit understood that it was bringing itself into conflict with the Ninth Circuit. See also Opp. 15-16 ("[t]he court below seems to have believed mistakenly that its en banc decision is in conflict with the *Ritchey* decision"). Other courts reading the decisions following this dramatic en banc split-decision in the Fifth Circuit will similarly conclude that they must choose between two competing rules regarding fraudulent joinder.

Second, respondent's excruciating effort to distinguish *Ritchey* is wholly without merit. She claims that the

"common defense" in *Ritchey* was a statute-of-limitations defense; that this limitations defense was a procedural not a substantive defense; and that *Ritchey* accepted the "common defense" exception to the rule of fraudulent joinder, but did not apply that exception to common procedural defenses. This is a tortured and absolutely incorrect reading of *Ritchey*.

In fact, *Ritchey* rejects the "common defense" exception, holding that the plaintiff "did not state a cause of action against anyone," and that "his failure to state that cause of action against [the in-state defendants] demonstrates beyond peradventure that [the in-state defendants] were sham defendants for purposes of removal." 139 F.3d at 1320. *Ritchey* thus recognizes that if a plaintiff fails to state a claim against the in-state defendant (even if for the same reason that plaintiff fails to state a claim against the out-of-state defendant), the in-state defendant has been fraudulently joined. See also *id.* at 1318.

Ritchey's analysis, which respondent wrongly cites for the proposition that there is a procedural-defense exception to the "common defense" rule, in fact, addressed a totally different question – whether the fraudulent-joinder doctrine applies not only to a plaintiff's failure to state a claim, but also to a valid defense. The court concluded that it need not "resolve th[e] issue" whether the doctrine of fraudulent joinder mandated dismissal of an in-state defendant where the defendant had a valid defense, *id.* at 1319, because under California law, a valid statute of limitations defense means that "no cause of action was stated," making a limitations defense just like a failure to state a claim. *Id.* at 1320. The court never suggested, however, that fraudulent joinder turned on whether the same defense would also bar the claim against the out-of-state defendant. To the contrary, the court held that the in-state defendants were fraudulently joined based on the "common defense." Thus, *Ritchey* stands in stark conflict with the decision below and *Boyer*.

Finally, respondent does not dispute that the holding of *LeBlang Motors, Ltd.* v. *Suburu of America, Inc.*, 148 F.3d 680, 691-92 (7th Cir. 1998) – finding fraudulent joinder even though there was a "common defense" – cannot be reconciled with the decision below. But, respondent says, the Seventh Circuit did not expressly discuss this issue and is not bound to adhere to the decision. It is, of course, for the Seventh Circuit to determine the extent to which *LeBlang*'s holding applies in like circumstances. But, plainly, *LeBlang*'s holding is consistent with *Ritchey* and contradicts *Boyer* and the decision below, further evincing the confusion and disarray in the lower courts on the scope of the fraudulent-joinder rule.

B. The Courts Of Appeals' Interpretations Of This Court's Fraudulent-Joinder Precedents Conflict.

Respondent has correctly identified both the lower court's confusion and its source – the fact that this Court has not provided guidance about the scope of the fraudulent-joinder doctrine in almost 80 years. In fact, this Court's cases were focused on assessing whether the plaintiff was seeking improperly to avoid federal jurisdiction, while the modern rule uses the objective merits of the plaintiff's claim as a proxy for such an improper intent to avert a lengthy inquiry into the plaintiff's subjective state. See *Recent Cases*, *supra* at 1090-91. Once this progression is understood, it becomes evident that the Court's older precedent did not address the "common defense" issue; that, as a result, the lower courts are in conflict about the application of this Court's cases to the objective fraudulent-joinder inquiry; and that this Court's guidance is sorely needed today.

Moreover, respondent's claim that the "common defense" exception to the fraudulent-joinder rule can be found in this Court's cases is simply wrong. Respondent erroneously claims that under the objective test, an in-state defendant is fraudulently joined if the defendants "traverse" or dispute the factual allegations of the plaintiff's claim. Having set up this straw man, respondent "proves" that this Court has *not* found

fraudulent joinder where the plaintiff can state a valid claim against the in-state defendant and defendants simply dispute the plaintiff's factual allegations. That point is, however, wholly irrelevant; the objective test for fraudulent joinder asks not whether the defendant traverses the facts alleged, but *whether the plaintiff can state a valid claim.*

The Court first articulated the fraudulent-joinder doctrine in *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176 (1907). There the plaintiff sued two in-state coworkers and his out-of-state employer under state law for an employment-related injury. The court authorized removal despite the apparent absence of diversity because the facts "showed conclusively" that the plaintiff had joined the in-state employees in "an attempt to defeat" federal jurisdiction. *Id.* at 184. Following *Wecker*, this Court continued to focus on the plaintiff's subjective intent in assessing whether the in-state defendant had been fraudulently joined. See, *e.g.*, *Pullman Co.* v. *Jenkins*, 305 U.S. 534, 541 (1939) ("[i]t is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith").

None of the cases cited by respondent uses an objective test to determine the plaintiff's improper intent to evade federal jurisdiction; and, *a fortiori*, none supports a "common defense" exception.

In *Southern Railway* v. *Lloyd*, 239 U.S. 496 (1916), the plaintiff filed claims under the Federal Employers' Liability Act against both out-of-state and in-state defendants; the out-of-state defendant claimed that the plaintiff had no claim against the in-state defendant because "the plaintiff was not engaged in interstate commerce at the time of the accident." *Id.* at 498. This Court found that the claim of fraudulent joinder amounted to only a "traverse" or denial "of the facts" the plaintiff alleged, and was an attempt to try the merits of "a cause of action, good upon its face." *Id.* at 500. The Court explained that "[i]t is only in cases wherein the facts alleged in the petition for removal are sufficient to fairly raise the

issue of fraud that the state court is required to surrender its jurisdiction." *Id.*

In *Southern Railway*, accordingly, the Court was not addressing the issue of fraudulent joinder based on an allegation that the plaintiff could not establish a cause of action against the in-state defendant. The out-of-state defendant was *contesting the factual allegations* of the plaintiff's claim against the in-state defendant. Moreover, the Court was not applying an objective test; it was looking for facts sufficient "to fairly raise the issue of *fraud*." *Id.* (emphasis supplied). Finally, the Court had an alternative ground for its decision – that removal based on diversity is not permitted in FELA cases. Plainly, this case does not stand for, and cannot be cited as, an endorsement of a "common defense" exception to the fraudulent-joinder rule.

Petitioner (with reliance upon Judge Jolly) has already explained in detail why *Chesapeake & Ohio Railway* v. *Cockrell*, 232 U.S. 146 (1914), cannot bear the weight respondent and the Fifth Circuit majority try to place upon it. See Pet. 12-14. In response to respondent's argument that this case supports a "common defense" exception, however, it is critical to note that, as in *Southern Railway*, the Court was focused not on the objective merits of the plaintiff's claim against the in-state defendants, but instead on the question whether the plaintiff had filed that claim in "good faith" or whether the plaintiff's allegations "show[ed] a fraudulent joinder." 232 U.S. at 153. And, again as in *Southern Railway*, the out-of-state defendant was merely contesting the factual allegations of the claim against the in-state defendant, not claiming that the plaintiff could not state a valid claim against the in-state defendant. Finally, the plaintiff's claim against the employees was not a sham, but was instead

necessary for the disposition of the plaintiff's *respondeat superior* claim against the employer. *Id.*[1]

That leaves respondent with *Illinois Central Railroad* v. *Sheegog*, where a plaintiff alleged that an out-of-state railroad and an in-state railroad and co-worker had been negligent in a derailment accident, defeating diversity. 215 U.S. 308, 315 (1909). The out-of-state railroad admitted that the in-state railroad was its lessor, and therefore that the railroads would be jointly liable for certain acts, but nonetheless asserted that "the charge of joint negligence against the lessor and lessee in causing the wreck . . . was made only for the [purpose of preventing the removal] and was fraudulent and knowingly false." *Id.* This Court held that the "mere epithet 'fraudulent' in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability, the plaintiff has an absolute right to elect, and to sue the tortfeasors jointly if he sees fit, no matter what his motive." *Id.* at 316.

As was true in *Southern Railway* and *Cockrell*, the Court was *not* deciding whether the plaintiff could establish a cause of action against the in-state defendant. Indeed, the out-of-state defendant *accepted* that the plaintiff had a valid cause of action against the in-state defendant based on joint and several liability, and disputed only the underlying factual allegations of the claim. *Sheegog* does not involve a contention that a plaintiff fraudulently joined an in-state defendant based on the plaintiff's inability to state a valid claim against that defendant. Even more clearly, *Sheegog* does not involve a contention that the "common defense" exception to the rule of fraudulent joinder would apply.

Purporting to interpret this Court's ancient precedent, particularly *Cockrell*, the Third and Fifth Circuits now make

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[1] Accordingly, as the discussion of *Cockrell* in the petition and in this reply brief makes clear, petitioner did not distinguish *Cockrell* solely on the ground that the out-of-state defendant was vicariously liable for the acts of the in-state defendants (Opp. 12 n.9), but for myriad other reasons.

an exception to the objective test for fraudulent joinder. But this Court's cases preceded the adoption of the exclusively objective test for fraudulent joinder and thus do not address its scope, let alone the further question whether a "common defense" exception exists. This Court's cases have been given inconsistent interpretations in the lower courts, and this Court should intervene to resolve the lower courts' confusion and disarray regarding the test for fraudulent joinder.

II. THE ISSUE PRESENTED IS RECURRING AND IMPORTANT, AND THE FIFTH CIRCUIT'S "COMMON DEFENSE" RULE IS WRONG.

Respondent appears to agree that the issue presented is recurring and important, but contends that the petition should not be granted because the "common defense" exception is not the subject of a conflict. Opp. 19. We showed above that this assertion is wrong and that respondent's inconsistent statements reveal that even she does not believe her own argument. See *supra* at 2. Thus, the substantial problems created by a conflict among the circuits on an important question of federal procedure arise here – the fundamental unfairness of a lack of uniformity and the unseemly forum shopping that inevitably follows. See Pet. 16-18.

Respondent also asserts that the decision below is "consistent with principles of judicial federalism" – in particular, the principle that "diversity jurisdiction must be construed narrowly to ensure that the proper balance of federal-state power is maintained." Opp. 19 (capitalization omitted). But, federal courts must exercise jurisdiction where they have it. See *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress"). And, federal courts have diversity jurisdiction when the in-state defendant is fraudulently joined. Respondent's federalism argument simply begs the real legal question which is the scope of the doctrine of fraudulent joinder, and

specifically whether there is a "common defense" exception to the fraudulent-joinder doctrine.

Moreover, the primary interest protected by diversity jurisdiction is the right of out-of-state defendants to receive a fair trial in a case filed by an in-state plaintiff. See *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-10 (1945). See also Brief of *Amici Curiae* Chamber of Commerce et al. at 7-9; Brief of *Amicus Curiae* American Association of Railroads ("AAR") at 2, 11-13. Even respondent agrees that an in-state defendant is fraudulently joined if the plaintiff cannot state a valid claim against that defendant for a reason not applicable to the plaintiff's claim against the out-of-state defendant. But the case for finding fraudulent joinder and enforcing diversity jurisdiction is even stronger when the plaintiff cannot state a valid claim against *any party* (as was the case here). In that circumstance, the plaintiff is likely to have joined the in-state defendant in the hope that the state court would be more inclined than a federal court to allow the in-state plaintiff's claim to go forward despite its lack of merit. See Brief of Chamber of Commerce et al. at 11, 12-15; Brief of AAR at 11-12.

In her last argument, respondent seems to contend that the petition should not be granted because the decision below was a "long-overdue attempt to clarify . . . and . . . confine" the fraudulent-joinder doctrine, although in the next breath she says that "after a brief moment of clarity," the Fifth Circuit "lapsed once more into loose construction of the doctrine." Opp. 21. Each of the Fifth Circuit cases cited as "loose construction," however, simply applies *Smallwood*, albeit in ways that respondent does not like.[2] But, respondent is no

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[2] *See Rainwater* v. *Lamar Life Ins. Co.*, 391 F.3d 636, 638 (5th Cir. 2004) (per curiam) ("[t]his case turns . . . on whether the limitations defense that disposes of all claims against in-state defendants in fact disposes of all claims against all defendants, as the principle of *Smallwood* is triggered only when all defendants are reached"); *Ross* v. *Citifinancial Inc.*, 344 F.3d 458, 463-64 (5th Cir. 2003) (in a decision before *Small-*

doubt correct that *Smallwood* will generate confusion, and that confusion will have significant undesirable consequences. As one commenter explained, the "common defense" rule raises more questions than it answers:

> [D]ifficult situations would arise if numerous defenses applied to the in-state defendant, only one of which was "common" to the diverse defendant, or if there were evidence that the diverse defendant with whom the in-state defendant shared the common defense might have been joined in bad faith as well. In both of these cases, the principles of the "common defense" doctrine could be applied only after extensive analysis of all claims, creating a high risk that the merits will be decided during the determination of jurisdiction. [*Recent Cases*, *supra* at 1093 (footnote omitted).]

Equally to the point, the "common defense" rule returns the federal courts to the bad old days of lengthy inquiries in removal proceedings. Thus, the "new analysis suffers from the disadvantages of both the direct inquiry [into subjective motive] and the proxy rule [the objective test]: it does not speak to the simple, objective impropriety of a plaintiff's claim, but neither does it provide the flexibility to adapt to all indications of subjective fraud." *Id.*

CONCLUSION

For the reasons set forth in the petition and in this reply brief, the petition for certiorari should be granted.

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wood, finding fraudulent joinder based on a limitations defense with no mention or decision of a claimed "common defense" exception), *reh'g en banc denied* (Jan. 25, 2005); *Adams* v. *Duff*, 2004 WL 3103778, at *3-*5 (E.D. Ky. Dec. 8, 2004) (recognizing *Smallwood* as governing authority but holding that it does not apply because the statute of limitations defense was not "common" as to all defendants).

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE AMERICAN SECURITY INSURANCE COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Illinois Central Railroad Company and Mississippi Department of Transportation's petition for certiorari is before this Court as a result of a en banc opinion issued from the Fifth Circuit Court of Appeals which, if not corrected, will drastically alter the procedure governing, and the applicability of, the doctrine of fraudulent joinder. If left uncorrected, said opinion will drastically alter a diverse defendant's ability to remove a matter despite the presence of diversity jurisdiction as determined by what is well-established law.

American Security Insurance Company wishes to file an amicus brief in support of Petitioners because the underlying opinion and its implications will directly effect many of the

current and future cases in which ASIC is involved. Indeed, the import of the issues presented in the underlying opinion far exceed the ramifications which will be felt by the actual parties in this matter. Said ramifications will be felt by every diverse defendant against whom a suit is improperly brought.

If ASIC is allowed to file the attached brief, ASIC believes such will help bring several issues and concerns to light which were not discussed in Illinois Central Railroad Company and Mississippi Department of Transportation's petitions for certiorari. Namely, that the so-called "common defense rule" has been overruled and discarded, if it ever existed to begin with, and has no place is modern jurisprudence.

More specifically, pursuant to binding precedent issued by this Court, a district court may not apply the "common defense rule" before it has ruled on the jurisdictional inquiry. Moreover, once the jurisdictional inquiry has been made and satisfied, a district court may not apply the "common defense rule" to remand an action. In the first instance, application of the "rule" brings the merits question before the subject matter jurisdictional inquiry. In the latter, application of the "rule" ignores the federal court's unflagging obligation to exercise the jurisdiction given them and the diverse defendant's right to a federal forum in diversity matters. In both instances, application of the "rule" works a "treason" unto the Constitution. Modern jurisprudence, thus, indicates that the "rule," if ever in effect, is no more, it has been overruled.

ASIC respectfully requests this court grant it leave to file the attached amicus brief in support of Petitioners to more fully develop these issues for the Court.

In accordance with Supreme Court Rule 37(2), the undersigned has contacted counsel for all parties regarding the filing of this brief. Both Petitioners Illinois Central Railroad Company and Mississippi Department of Transportation have

consented to the filing of this brief. Respondent Smallwood, however, has withheld consent for ASIC to file this brief rendering the instant motion necessary.

Respectfully submitted,

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v.

KELLI SMALLWOOD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMERICAN SECURITY INSURANCE COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE* [1]

American Security Insurance Company ("ASIC") is a corporation organized and existing under the laws of the state of Delaware with its principal place of business in the state of Georgia. ASIC is interested in the instant action as the same will directly effect many of the current and future cases in which ASIC is involved. Indeed, the import of the issues presented in the underlying opinion far exceed the ram-

[1] This brief was not authored in whole or in part by counsel for any party in this case, and no one other than *amici* and their counsel made any monetary contribution to its preparation or submission. S. Ct. R. 37.6.

ifications which will be felt by the actual parties in this matter. Said ramifications will be felt by every diverse defendant, including ASIC, against whom a suit is improperly brought. Further, the underlying Fifth Circuit opinion which gives rise to Illinois Central Railroad Company and Mississippi Department of Transportation's petition for certiorari evidences a divide between the circuits of this nation. ASIC is directly affected by this divide inasmuch as it conducts interstate, and inter-circuit, business and is, therefore, subjected to differing procedures governing the doctrine of fraudulent joinder and the determination of whether federal jurisdiction is present. ASIC will be directly benefitted if this Court's grants certiorari in this matter and overrules the Fifth Circuit's en banc opinion.

SUMMARY OF THE ARGUMENT

It is clear the "common defense" rule espoused by the Fifth Circuit in *Smallwood v. Illinois Central R.R. Co.*, 2004 WL 2047314 (5th Cir. Sep 10, 2004), and the Third Circuit in *Boyer v. Snap-On Tools Corp.*, 913 F. 2d 108 (3rd Cir. 1990), finds no support in this Court's opinion in *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146 (1914). Even assuming such is not the case, however, modern jurisprudence's treatment of the rule's necessary implications indicates that it has been overruled and discarded.

The "common defense" rule holds that any defense or grounds which may negate liability as to both the diverse and non-diverse defendants alike cannot form the proper predicate of a fraudulent-joinder-based-removal. This holding is based primarily upon this Court's language in *Cockrell* to the effect that the railway's "showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." Under the "common defense" rule, then, any defense or grounds which may operate to negate liability as to

both the diverse and non-diverse defendants alike goes "to the merits of the action as an entirety."

This Court has stated, since rendering *Cockrell*, that the subject matter jurisdictional inquiry must be asked and answered first. This is true even when the "merits question is more readily resolved and the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." Thus, when the jurisdictional inquiry turns on the application of a defense to the claims against a non-diverse defendant (as it does in every case in which the "common defense" rule may be deemed applicable), the defense, if not applied solely to the non-diverse defendant first, goes "to the merits" of the action. This under modern jurisprudence cannot be done until after the (subject matter) jurisdictional inquiry has been made. The "common defense" rule, thus, cannot be utilized before the jurisdictional inquiry has been made.

Once jurisdiction is determined to be present, the federal courts have a "virtually unflagging" obligation to exercise the same. The judiciary "has no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." Likewise, a diverse defendant has a right to a federal forum pursuant to Title 28, Section 1441(a) if diversity jurisdiction is present. Consequently, the "common defense rule" cannot be utilized to effect a remand after subject matter jurisdiction has been deemed present. The "common defense" rule, thus, even if it finds support in the *Cockrell* opinion, which it does not, has no place in modern jurisprudence.

ARGUMENT

Illinois Central Railroad Company ("ICRC") and Mississippi Department of Transportation's ("MDOT") petition for certiorari is before this Court as a result of an en banc opinion

issued by a near-evenly divided Fifth Circuit Court of Appeals. That opinion, which follows the Third Circuit Court of Appeals' decision in *Boyer v. Snap-On Tools Corp.*, 913 F. 2d 108 (3rd Cir. 1990), finds that this Court, more than ninety years ago in *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146 (1914), held that a defense which is equally applicable to both a diverse and non-diverse defendant alike cannot form the proper predicate of a fraudulent-joinder-based removal. That very proposition has been rejected by the Ninth and Seventh Circuit Courts of Appeal. *See Ritchey v. Upjohn Drug Company*, 139 F. 3d 1313, 1318-20 (9th Cir. 1998); *LeBlang Motors, Ltd. v. Suburu of America, Inc.*, 148 F. 3d 680, 691-92 (7th Cir. 1998). Thus, the determination and existence of federal subject matter jurisdiction now differs from circuit to circuit and court to court.

The subject Fifth Circuit opinion, *Smallwood*, and its predecessor, the Third Circuit opinion *Boyer*, create an exception to the tenets of modern federal jurisdiction. This exception, which has come to be known as the "common defense" rule, is not supported by *Cockrell*, the opinion both offending circuits credit with providing the gravamen of the rule. And, even if solid precedent existed in support of the rule, of which there is none, modern jurisprudence's treatment of the rule's necessary implications indicates that it has been overruled and discarded. This Court should, thus, grant ICRC and MDOT's petition for certiorari and reverse the Fifth Circuit's en banc opinion to finally resolve this issue of dire import and rebalance the equities of jurisdiction throughout the federal courts.

I. JURISDICTION MUST BE DETERMINED FIRST

This Court has repeatedly and abundantly made clear that the existence of jurisdiction is paramount. "Without jurisdiction a court cannot proceed at all in any cause." *Steel Co.*

v. Citizens for a Better Environment, 523 U.S. 83, 94 ('9[illegible] (quoting *Ex parte McCardle*, 74 U.S. 506 (1868)). Whe jurisdiction does not exist, or if it ceases to exist, the only authority the court maintains is to announce the lack the jurisdiction and dismiss the case. *Id.* (quoting *McCardle*, 74 U.S. at 506).

For these reasons, jurisdiction has been deemed a "threshold matter [that] 'springs from the nature and limits of the judicial power of the United States.'" *Id.* (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). It is the "first and fundamental question," *Id.* (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)), and it is "inflexible and without exception." *Id.* at 95 (quoting *Mansfield*, 111 U.S. at 382). Indeed, the jurisdictional inquiry is of such import, "the court is bound to ask and answer it for itself" even when not argued by the parties. *Id.* at 94 (quoting *Jones*, 177 U.S. at 453).

Noting these most basic jurisdictional tenets and precepts, this Court recently held that subject matter jurisdiction must be established *before* a court may delve into the merits of a case. *Id.* In point of fact, the Court held that the (subject matter) jurisdictional inquiry must be made and answered first even when the "merits question is more readily resolved and the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Id.* at 93. In other words, subject matter jurisdiction is not a hollow formality that may be overcome by economy or other concerns no matter how legitimate they may be. Subject matter jurisdiction is a requisite without exception. It must always be determined first.

II. A DEFENDANT HAS BEEN FRAUDULENTLY JOINED WHEN NO CAUSE OF ACTION CAN BE SUPPORTED AGAINST HIM/HER UNDER STATE LAW

As early as 1913, this Court stated that a court need not determine more than "whether there was a colorable ground for [the plaintiff's cause of action against the non-diverse defendant]" before it could determine whether the non-diverse defendant had been fraudulently joined. *Chicago, Rock Island & Pacific R.R. Co. v. Schwyhart*, 227 U.S. 184, 194 (1913). *See also Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176 (1907); *Lathrop, Shea & Henwood Co. v. Interior Constru. & Improvement Co.*, 215 U.S. 246 (1909). If there were colorable grounds for the plaintiff's claim, the non-diverse defendant would be deemed properly joined and diversity incomplete. If there were not colorable grounds for the plaintiff's claim, the non-diverse defendant would be deemed fraudulently joined and his citizenship disregarded for diversity purposes.

This rule, this doctrine of jurisprudence, has been followed by the inferior courts of appeal since its pronouncement over a 100 years ago. Indeed, the Fifth Circuit, citing *Wecker*, 203 U.S. at 176, noted as early as 1958 that "if the plaintiff's petition fails to state a cause of action against the resident defendant" the joinder "will be regarded as a fraudulent joinder for the purpose of defeating the jurisdiction of the federal court, and . . . will be ineffective to prevent the removal of a case otherwise removable upon the ground of diversity jurisdiction." *Covington v. Indemnity Ins. Co. of North American*, 251 F.2d 930, 934 (5th Cir. 1958) (citing *Wecker*, 203 U.S. at 176).

Consequently, the law governing fraudulent joinder, as based upon a near century-old pronouncement from this Court, is well-settled and clear: a defendant is fraudulently joined if there is no reasonable possibility of recovery against

him/her in state court. *See Schwyhart*, 227 U.S. at 194; *Wecker*, 204 U.S. at 176; *Lathrop*, 215 U.S. at 246. Moreover, if there is no reasonable possibility of recovery against the defendant in state court, his/her citizenship is disregarded for diversity purposes and federal jurisdiction is present.

III. THE FIFTH AND THIRD CIRCUITS' INTERPRETATION OF *COCKRELL* HAS BEEN OVERRULED

Assuming, for sake of argument only, that *Cockrell* states the proposition which the Fifth and Third Circuits cite it, it has been overruled by the aforementioned dictates of modern federal jurisprudence as explicitly set forth by this Court. Specifically, the Fifth and Third Circuits hold that any defense or grounds which may negate liability as to both the diverse and non-diverse defendants alike cannot form the proper predicate of a fraudulent-joinder-based-removal. This holding is based primarily upon this Court's language in *Cockrell* to the effect that the railway's "showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." *Cockrell*, 232 U.S. at 153.

In *Cockrell*, the railway's "showing" was but a mere denial of the facts upon which the plaintiff based his claims against the non-diverse defendants. The Fifth and Third Circuits, though, state that this "showing" may be comprised of any defense and, indeed, any grounds, which are common to both the diverse and non-diverse defendants. Consequently, pursuant to this reasoning and the plain language of *Cockrell*, any defense or grounds which may operate to negate liability as to both the diverse and non-diverse defendants alike goes "to the merits of the action as an entirety." *Id.* at 153. Therein lies the dilemma. If the application of a defense or

grounds goes "to the merits" of an action, application of the same cannot be made until after the (subject matter) jurisdictional inquiry has been made. *Steel Co.*, 523 U.S. at 94.

As a result, under the Fifth and Third Circuits' interpretation, defenses and/or grounds which may clearly and obviously negate the liability of a non-diverse defendant must be judicially ignored when determining if the non-diverse defendant has been fraudulently joined. Indeed, defenses and grounds which clearly indicate the plaintiff fraudulently joined the non-diverse defendant solely to defeat and destroy diversity jurisdiction must be ignored. Consequently, matters in which a non-diverse defendant has been joined, but clearly cannot be liable, i.e., matters wherein diversity jurisdiction exists, will be remanded to state court and the doctrine of fraudulent joinder will be rendered a nullity.

Modern jurisprudence indicates that such is neither the system contemplated (by either Congress or this Court) nor the system in place. The (subject matter) jurisdictional inquiry must be made first. *Id.* In making this inquiry, every defense which may negate liability as to the non-diverse defendant must be taken into account as any such defense may indicate that the non-diverse defendant was fraudulently joined. On the other hand, the applicability of a defense as to a diverse defendant cannot be considered - such is not part of the jurisdictional inquiry. The jurisdictional inquiry focuses solely on the plaintiff's possibility of recovery against the non-diverse defendant in state court. The district court's focus cannot be arbitrarily shifted from the former to the latter.

Accordingly, it must be taken that either *Cockrell* does not state the proposition for which the Fifth and Third Circuits cite it, or *Cockrell* has been overruled. In either case, the "common defense rule" as espoused by the offending circuits is wholly inapplicable in determining if a non-diverse

defendant has been fraudulently joined. What is more, it is wholly incapable of preventing a federal court from considering any defense which may render a non-diverse defendant fraudulently joined. Hence, if a defense, even a common defense, renders the plaintiff's joinder of the non-diverse defendant fraudulent, diversity is complete and federal jurisdiction is proper.

IV. THE FEDERAL COURTS MUST EXERCISE THE JURISDICTION GIVEN THEM

Once diversity is deemed complete (assuming the amount in controversy is met), diversity jurisdiction is present. Once jurisdiction is present, the federal courts have a "virtually unflagging" obligation to exercise the same. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Indeed, as this Court noted almost two-hundred years ago in *Cohens v. Virginia*, "[the judiciary] has no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." 19 U.S. 264, 265 (1821). *See also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *Colorado River*, 424 U.S. at 817; *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964); *McCellan v. Carland*, 217 U.S. 268, 282 (1910); *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909); *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893).

Much analogous to the federal court's unflagging obligation to exercise the jurisdiction given them is the diverse defendant's right to a federal forum. Pursuant to Title 28, Section 1441(a), a diverse defendant may remove a matter wherein diversity jurisdiction is present to the district court embracing the place where the action is pending. *See* 28 U.S.C. § 1441(a). This important right is only limited in two respects: the amount in controversy must be met and the removing defendant cannot be a resident of the forum state.

See 28 U.S.C. §§ 1332, 1441(b). Provided these requirements are met, the diverse defendant has an incontestable right to have the matter heard by a federal court. *See* 28 U.S.C. § 1441.

Consequently, the "common defense rule" cannot be utilized to effect a remand after subject matter jurisdiction has been deemed present. Indeed, the federal court's "unflagging obligation" to exercise the jurisdiction given it and the diverse defendant's incontestable right to a federal forum (upon the existence of diversity jurisdiction) cannot be overcome by an arbitrary rule. Such would act as a "treason" to the Constitution and would unravel the system created by Congress. Once diversity jurisdiction is deemed present, the federal court's obligation to exercise the same is a constitutional imperative. As a result, the "common defense rule" may not be used to remand a matter after the (subject matter) jurisdictional inquiry has been made.

CONCLUSION

The "common defense rule" has no place in modern jurisprudence. Pursuant to binding United States Supreme Court precedent, a district court may not apply the "common defense rule" before it has ruled on the jurisdictional inquiry. Moreover, once the jurisdictional inquiry has been made and satisfied, a district court may not apply the "common defense rule" to remand an action. In the first instance, application of the "rule" brings the merits question before the (subject matter) jurisdictional inquiry. In the latter, application of the "rule" ignores the federal court's unflagging obligation to exercise the jurisdiction given them and the diverse defendant's right to a federal forum in diversity matters. In both instances, application of the "rule" works a "treason" unto the Constitution. Modern jurisprudence, thus, indicates that the "rule," if ever in effect, is no more, it has been overruled. Accordingly, this Court should grant Illinois

Central Railroad Company and Mississippi Department of Transportation's petition for certiorari to finally remedy this issue, conclusively resolve the split in the circuits regarding the issue and, once again, restore continuity to the rules and law governing the determination and existence of federal jurisdiction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY AND
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Petitioners,

v.

KELLI SMALLWOOD
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Illinois Central Railroad Company, has consented to AAR's filing of a brief.[1] Respondent, Kelli Smallwood, has refused consent. AAR has recently learned that respondent has waived her right to file a response to the petition and, therefore, in order to facilitate this Court's prompt review of the case, AAR is filing its motion and brief early.

[1] The letter expressing consent has been filed with the Clerk of the Court.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

One area in which AAR has worked on behalf of its member railroads is in helping to create and maintain a favorable litigation environment, both with regard to substantive and procedural issues. AAR's member railroads operate nationwide and are named as defendants in courts throughout the United States. Depending on the jurisdiction in which suit is brought, and the nature of the claims made, railroad defendants may wish to exercise their right to a federal forum when federal law provides that option. This case, and the legal issues it raises, including the federal preemption defense, is far from unique, and is exactly the kind of case in which a federal forum is likely to be desired. As a result of the decision below, there is a growing conflict over whether a railroad would be entitled to a federal forum in such a case. Thus, AAR's member railroads have an especially strong interest in having that conflict resolved.

As a trade association representing the nation's major railroads, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention. AAR

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[2] *E.g., Consolidated Rail Corp. v. Richards*, 124 S.Ct. 961 (2003); *National Railroad Passenger Corp. v. Griesser*, 534 U.S. 970 (2001); *Kansas City Southern Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

has had a long standing involvement in rail safety issues, including those related to grade crossings, in the legislative, regulatory and judicial arenas. AAR has supported the concept of federal preemption as an important tool for maintaining the national uniformity of regulation that is essential in the rail industry. Finally, AAR maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide, frequently in litigation that raises the same legal issues as the case below.

The decision below, and its implications on the right to a federal forum, will impact a significant portion of the railroad industry, not just the individual railroad involved. Thus, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The interest of *amicus curiae* Association of American Railroads (AAR) is set forth in the Motion For Leave To File A Brief *Amicus Curiae.*

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of petitioner.

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

SUMMARY OF THE ARGUMENT

While the important question related to federal diversity jurisdiction presented in the petition is no doubt of interest to all corporate defendants, it has particular relevance to railroads, as the tactic used by the plaintiff in this case to defeat federal diversity jurisdiction is likely to become a common feature in railroad litigation. In this typical railroad crossing accident case, the Fifth Circuit reversed the district court, finding that since the federal preemption defense which barred a claim against the in-state defendant state agency also protected the railroad, joinder of the agency was not fraudulent. The concept of federal preemption frequently plays a role in railroad litigation, particularly in cases that arise out of grade crossing accidents. Crossing suits are common, and typically include claims related to the crossing warning devices. The preemption defense, which bars state tort claims related to the adequacy of federally-funded crossing warning devices, applies to all defendants named in these cases.

Because crossings are ubiquitous, railroads are potentially subject to suits arising out of crossing accidents in virtually every jurisdiction throughout the nation. Where the plaintiff and defendant are not citizens of the same state, Congress has granted the defendant the right to remove the case to federal court to avoid potential state court bias in favor of a local plaintiff, and railroads often seek this option in crossing cases. The ruling below provides an in-state plaintiff with the ability to defeat federal diversity jurisdiction by also naming the in-state transportation agency with jurisdiction over the crossing, even though there is no chance of recovery against the agency. Other federal courts would not permit this device to defeat diversity jurisdiction, leaving a defendant's right to remove such a case in a state of confusion that will uniquely impact the nation's railroads.

ARGUMENT

I. BECAUSE THE CASE BELOW REPRESENTS A COMMON SCENARIO IN RAILROAD GRADE CROSSING LITIGATION THE RAILROAD INDUSTRY HAS A PARTICULAR INTEREST IN A RESOLUTION OF THE CONFLICT IN THE COURTS OF APPEALS ON THE PROPER FRAUDULENT JOINDER ANALYSIS

A. As in the Case Below, Plaintiffs Typically Attempt to Litigate Crossing Accident Cases Against Out-Of-State Railroad Defendants in State Court

Petitioners have convincingly demonstrated the need for review of this case by this Court. Failing to resolve the split among the federal circuits on the proper fraudulent joinder analysis will perpetuate a lack of uniformity with regard to an important threshold issue in numerous lawsuits: a litigant's right of access to the federal courts. Adding to the significance of the issue is that the split among the circuits arises from conflicting interpretations of a prior decision of this Court. *Chesapeake & Ohio Ry. v. Cockrell,* 232 U.S. 146 (1914). Moreover, as petitioner correctly argues, the issue presented will recur with great frequency and, as a result, will "persistently affect the exercise of federal court jurisdiction." From the standpoint of the railroad industry, this observation rings especially true.

The railroad industry has a particular concern over the decision below, not because the case involves a railroad defendant, but rather because the situation that gave rise to this case was hardly an isolated incident. The Fifth Circuit's opinion (as well as the earlier decision by the Third Circuit in *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108 (3rd Cir. 1990)), which has forged a tool to enable plaintiffs to defeat federal diversity jurisdiction, is no doubt of concern to all potential

corporate defendants. However, this tool has the potential to be wielded with great frequency against railroad defendants. Litigation arising out of crossing accidents is not uncommon, and frequently involves a plaintiff whose state citizenship differs from that of the railroad defendant. As typified by the case below, the litigation strategy pursued by the plaintiff often results in a dispute over the proper forum for the lawsuit.[2]

This case arose out of an accident at a highway-rail grade crossing, which resulted in a lawsuit being filed under state law attributing allegedly inadequate crossing warning devices to railroad negligence. The complaint was filed in state court. Since the railroad and the plaintiff were citizens of different states the railroad was entitled to remove the case to federal court, 28 U.S.C. § 1332(a)(1); 28 U.S.C. § 1441(a), and chose to exercise that right.[3]

The plaintiff also named as a defendant the Mississippi Department of Transportation (MDOT), the state agency with jurisdiction over state roadways. The same negligence allegation brought against the railroad, as well as a related allegation, was brought against MDOT, both of which attacked the adequacy of the warning devices that were present at the crossing at the time of the accident. Like the plaintiff, MDOT is a citizen of Mississippi, and, arguing that complete diversity did not exist, plaintiff sought to remand the case to state court. In response, the defendants argued,

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[2] In addition to the railroad, the plaintiff in a crossing case often will name as defendants individual members of the train crew who reside in the same state as the plaintiff in an effort to defeat diversity jurisdiction. Frequently, the claims against train crew defendants will be dismissed by the plaintiff before trial so the case the jury hears is only against a corporate defendant and not against the, presumably, more sympathetic individual railroad employees.

[3] The plaintiff is a citizen of Mississippi; the defendant railroad is a citizen of Illinois.

and the district court found, that the claims alleged against MDOT were preempted by federal law and that therefore "Plaintiff has no possibility of establishing a cause of action against MDOT . . . in state court." *Smallwood v. Illinois Cent. R.R.*, 203 F.Supp.2d 686, 694 (S.D. Miss. 2002). Consequently, the court denied the motion to remand, concluding that "MDOT was fraudulently joined and therefore, that its citizenship should not be considered for the purpose of diversity of citizenship analysis under 28 U.S.C. § 1332." *Id.*

The Court of Appeals reversed, finding that joinder was not improper because the preemption defense, which also protected the railroad, "effectively decided the entire case" and that "when a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant." *Smallwood v. Illinois Cent. R.R.*, 385 F.3d 568, 571 (5th Cir. 2004) (en banc), *aff'g*, 342 F.3d 400 (2003). Thus, the district court and (the sharply divided) Court of Appeals concluded that the availability of the defense of federal preemption called for the opposite result regarding the application of the federal diversity statute. (The Third and Ninth Circuits have also reached opposite conclusions on the impact of the availability of a common defense that disposes of the case against both the in-state and out-of-state defendant. [Pet. Br. at 10-11]) Recent developments in the law have rendered the scenario presented here likely to recur in numerous jurisdictions.

B. The Federal Preemption Defense, Which Played a Prominent Role in This Case, Frequently is an Issue in Railroad Litigation

Though it has a long history in the railroad industry, the doctrine of federal preemption has become a prominent, and common, feature in railroad litigation in the past few decades.

Beginning in the late nineteenth century, Congress has taken an active role in regulating railroad safety, *see e.g.*, Safety Appliances Act of 1893 (SAA), c. 196, 27 Stat. 531; Boiler Inspection Act (BIA), c. 103, 36 Stat. 913 (1911), and this Court has long recognized the primacy of federal regulation in this area. *See Illinois Cent. R.R. v. Williams*, 242 U.S. 462, 466-67 (1917) (importance of uniformity of regulation). These statutes have been found to occupy the field in the areas at which they are directed. *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926)(BIA); *Southern R.R. v. Railroad Comm'n*, 236 U.S. 439 (1915)(SAA).[4]

Notwithstanding having previously enacted a number of railroad safety statutes, in 1970 Congress ultimately reached the conclusion that a more comprehensive approach was needed for regulating the important subject of rail safety. Though concluding that the existing federal laws regulating discrete areas of rail safety were "reasonably effective in their respective areas," H.R. Rep. No. 91-1194, 91st Cong., 2nd Sess., *reprinted in* 1970 U.S.C. C. & A. N. 4104, 4106, Congress enacted the Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971, with the purpose of "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 45 U.S.C. § 421 (now codified at 49 U.S.C. § 20101).[5]

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[4] Under the U.S. Constitution, when a state law conflicts with, or frustrates, federal law, the state law must yield. U.S. CONST., Art. VI, cl. 2; *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Thus, state law is preempted where federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for states to supplement it, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or where Congress expressly so provides through a statutory enactment. *English v. General Electric Co.*, 496 U.S. 72 (1990).

[5] FRSA was recodified in 1994 and moved to Title 49 of the U.S. Code. Pub. L. No. 103-272, 108 Stat. 745. The recodification was not meant to make any substantive changes to the law's provisions. *See id.* § 6(a).

The driving force behind enactment of FRSA was the recognition by Congress that nationally uniform regulation in all areas of railroad safety was critical. Congress explained that the railroad industry

> has a truly interstate character calling for a uniform body of regulation and enforcement. * * * To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

1970 U.S.C.C.A.N. at 4110-11. Not only did Congress grant the Federal Railroad Administration (FRA) plenary power to regulate rail safety,[6] FRSA declared that "laws, rules, regulations, orders, and standards relating to rail safety shall be shall be nationally uniform to the extent practicable," thereby expressly preempting state law pertaining to railroad safety. 45 U.S.C. § 434.[7] Acknowledging the role some states had already assumed in regulating rail safety, 1970 U.S.C.C.A.N. at 4108-09, Congress permitted those laws to remain in effect, but only "until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement." 45 U.S.C. § 434. Thus, federal law preempts state law pertaining to railroad safety whenever the Secretary of Transportation issues a regulation "covering the subject matter of the state law." *See CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664-65 (1993). Federal preemption of state law under FRSA applies equally to state common law

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[6] When the Department of Transportation was established, authority for implementing the railroad safety laws enacted by Congress, originally a function of the Interstate Commerce Commission, was delegated to the Federal Railroad Administration, an agency within DOT. Department of Transportation Act, Pub. L. No. 89-670, § 6(e), 80 Stat. 931 (1966).

[7] The preemptive provision of FRSA is now codified at 49 U.S.C. § 20106.

as it does to acts of a state legislature or regulatory agency. *Id.* at 664.

In *Easterwood*, this Court held that certain types of tort claims may not be brought under state law because they are tantamount to attempts to regulate in areas where federal law takes precedent. Specifically, regulations promulgated by the Secretary of Transportation cover the subject matter of the adequacy of grade crossing warning devices, 23 C.F.R. § 646.214(b)(3)&(4), and, when those regulations are applicable, states may not impose additional or different requirements with respect to the adequacy of such devices. 507 U.S. at 670-71. Those regulations are applicable whenever federal funds have participated in the installation of warning devices. Thus, whenever a crossing is equipped with federally-funded warning devices, state law may not require the installation of different devices, nor adjudicate a defendant legally liable for having failed to do so. *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996); *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188 (10th Cir. 1996); *Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1995).[8]

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[8] State law attempting to regulate railroad safety is preempted with respect to matters other than grade crossing warning devices. For example, in *Easterwood*, this Court held that the subject of train speed is covered by federal regulation and may not be regulated by states. 507 U.S. at 674-75. As a result, state law negligence claims alleging a train was being operated too fast may not go forward (in the absence of evidence that the federal regulations were violated). *E.g., MacFarlane v. Canadian Pac. Ry. Co.*, 278 F.3d 54 (2nd Cir. 2002); *Michael v. Norfolk & Western Ry. Co.*, 74 F.3d 271 (11th Cir. 1996); *St. Louis SW Ry. Co. v. Pierce*, 68 F.3d 276 (8th Cir. 1995). *See also Burlington Northern and Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790 (7th Cir. 1999) (Federal regulations preempt a state's two-person crew requirement with respect to certain types of operations.); *CSX Transp., Inc. v. City of Plymouth*, 92 F.Supp.2d 643 (E.D. Mich. 2000) *aff'd*, 283 F.3d 812 (6th Cir. 2003)(FRSA preempts state crossing blocking statute); *Union Pac. R.R. et al. v. Calif. Pub.*

After *Easterwood*, questions related to preemption under FRSA that some lower courts had read as having been left open continued to be frequently litigated; in *Norfolk Southern R.R. v. Shanklin*, 529 U.S. 544 (2000), this Court unequivocally settled those questions. This Court held that federal funding of crossing warning devices triggers preemption regardless of whether (1) the Secretary of Transportation approved the warning devices as adequate; (2) a diagnostic team had reviewed the crossing; or (3) the characteristics listed in the federal regulations, which generally warrant gates and lights, were present at the crossing. *Shanklin* made it clear that these factual issues are not relevant to a preemption defense. Whenever a warning device has been installed with federal funds, state lawsuits alleging that the railroad negligently failed to install adequate warning devices at the crossing must be dismissed, with no further showing necessary. "What States cannot do—once they have installed federally-funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." 529 U.S. at 358.

While railroads are the most commonly named defendants in lawsuits arising out of crossing accidents, the preemptive effect of FRSA does not just apply to railroad defendants. In *Fifth Third Bank v. CSX Corp.*, 306 F.Supp.2d 841, 848-50 (N.D. Ind. 2004), the court rejected the argument that "federal preemption is not available as a defense to any party besides the Railroad." Rather, the court held that the fact that the warning devices had been installed with federal funds immunized the county from liability from claims alleging the inadequacy of the devices. Once federal preemption applies

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Utilities Comm'n, 346 F.3d 851 (9th Cir. 2003) (Preemption of certain state track standards and training regulations); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983)(State lawsuit alleging railroad failed to install additional warning lights on its locomotive preempted.)

to a crossing, "the state as well as the railroad is 'no longer duty-bound in the tort sense, for causes of action based on the adequacy of the crossing safety device.'" *Hernandez v. State of Minnesota*, 680 N.W.2d 108, 114 (Minn. App. 2004) (Concluding "that the state and city have no common law duty that could be violated by failing timely to install additional warning devices." *Id.* at 115).

C. The Scenario Presented in the Case Below is Likely to Recur in Numerous Railroad Cases

Lawsuits arising out of accidents at grade crossings are a significant area of litigation for railroads, and, the federal preemption defense plays a frequent and recurring role in this litigation. Grade crossings, which are the intersections of railroad tracks and roadways, are the locus of the greatest interaction between railroads and the general public. There are over 150, 000 public grade crossings in the United States, with ten states having in excess of 5,000 public crossings within their borders. Federal Railroad Administration, *Railroad Safety Statistics: 2002 Annual Report*, Table 9-2 (2004) (*Railroad Safety Statistics*). Crossing safety has improved markedly in recent decades: in the 20 year period from 1984 through 2003, crossing accidents have decreased by 63 percent, and the number of fatalities has decreased by 56 percent.[9] Nonetheless, accidents at crossings generate a substantial amount of litigation. Over the past five years, 1347 lawsuits related to crossing accidents were filed against railroads. In 2003, in addition to the filing of over 200 such suits, over 1,800 crossing claims were made against railroads,

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[9] In 1984, there were 6,530 such accidents and 543 fatalities; in 2003, there were 2,425 acidents and 239 fatalities. Railroad Safety Statistics are available at the FRA's website at http://www.fra.dot.gov.

many of which could ultimately result in lawsuits.[10] Crossing suits are almost always brought under state law.

Because crossings are ubiquitous, railroads are potentially subject to suits arising out of crossing accidents in virtually every jurisdiction throughout the nation. The large freight railroads and Amtrak operate in numerous states.[11] However, for the purposes of federal jurisdiction, railroads are not considered to be citizens of all the states in which they operate. Rather, as corporations, railroads may be considered citizens of no more than two states for the purpose of federal diversity jurisdiction: the state of incorporation and, if different, the state of the principle place of business. 28 U.S.C. § 1332(c)(1). Congress recognized that "corporations which do business over a large number of States, such as railroads, insurance companies, and other corporations whose businesses are not localized in one particular State" are to be regarded as citizens of "that one of the States in which was located its principle place of business." *Gilardi v. Atchison, Topeka and Santa Fe Ry. Co.*, 189 F.Supp. 82, 85-86 (N.D. Ill.) (quoting from Senate Report 1830, 1958 U.S. Congressional & Admin. News 3102).

The federal diversity statute gives effect to Congress' policy decision to protect out-of-state litigants from perceived state court bias by providing a neutral forum. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945); *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1855); *Ziady v. Curley*, 396 F.2d 873, 875 (4th Cir. 1968). Consequently, when a railroad is

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[10] Statistics on grade crossing litigation are reported to AAR in an annual survey of member and non-member railroads.

[11] The nations four largest freight railroads all have operations in over 20 states. *See* Class I Railroad Annual Report for 2003 (Form R-1) of Burlington Northern and Santa Fe Railway, CSX Transportation, Norfolk Southern Railroad and Union Pacific Railroad, submitted to the Surface Transportation Board. Amtrak operates in 46 states nationwide. *See* Amtrak Website, http://www.amtrak.com.

sued in state court, if its state of incorporation and principle place of business are different from the state of the plaintiff's citizenship, the railroad is entitled to a federal forum, an option that it is fully entitled to exercise.

Nonetheless, in jurisdictions in two federal circuits, plaintiffs can subvert the congressional policy that provides a federal court option for out-of-state defendants by bringing a claim, clearly precluded by preemption, against an in-state defendant like the state transportation agency. Petitioners point out that MDOT may well find itself embroiled in railroad crossing cases throughout Mississippi. [Pet. Br. at 17] From the standpoint of the railroads, the concern is more widespread. Every state has, within its governmental structure, an agency (akin to petitioner MDOT) with jurisdiction over the state's roadways, which typically includes jurisdiction over the state's public crossings. Thus, the tactic employed by plaintiff in this case may become commonplace not only in Mississippi, but in numerous other states.

Although the state agencies have no role in operating the train, their jurisdiction over the highway-rail intersection makes them a potential target for claims alleging the inadequacy of the crossing warning devices. In cases where federal funds have been expended on the warning devices, preemption forecloses such claims. Yet, in litigation arising from an accident at any one of the nearly 25,000 crossings in the six states within the Third and Fifth Circuits, *see Railroad Safety Statistics*, Table 9-2, railroads can expect the state agency to be used as a device to prevent removal to federal court if that suits the plaintiff's litigation strategy. On the other hand, such a move would be precluded in the states within the Ninth Circuit, *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998), and most likely the Seventh Circuit. *See LeBlang Motors, Ltd. v. Suburu of Am., Inc.* 148 F.3d 680 (7th Cir. 1998). At the same time, the tactic used in the case below may be attempted in courts in the other jurisdictions that have not

yet definitively ruled on whether the "common defense rule" defeats a claim of fraudulent joinder.

This development is particularly troublesome, and relevant, to the railroad industry. Rights under federal law, including jurisdictional statutes, should be uniformly applied. As petitioners demonstrate, with respect to the important question of whether an in-state defendant has been properly joined, instead of uniformity there is confusion and a lack of clarity. This confusion will infect numerous railroad cases, and embolden plaintiff to name additional defendants, against whom they have no expectation of recovery, solely as a devise to defeat the out-of-state railroad defendant's right to remove the case to federal court.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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January 4, 2005

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No. 04-831

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY and
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Petitioners,

v.

KELLI SMALLWOOD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONERS

The Chamber of Commerce of the United States, the American Financial Services Association, and the American Insurance Association hereby move, pursuant to Rule 37.2, for leave to file the attached brief in support of the petitioners. The three amici organizations all have a substantial interest in the issue presented in this case, which concerns the scope of federal diversity jurisdiction.[1]

Founded in 1912, the Chamber of Commerce of the United States is the world's largest business federation. The Chamber represents an underlying membership of more than 3 million businesses of every size, with nearly 2,000 state and local chambers and associations, along with 97 American Chambers of Commerce abroad. The mission of the Chamber is to promote democracy, individual opportunity, and free enterprise. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

The American Financial Services Association (AFSA) is a trade association representing approximately 360 non-traditional market-funded providers of financial services to consumers and small businesses. AFSA members are important sources of credit to the American consumer, providing over 20 percent of all consumer credit in this country. Since its founding in 1916, AFSA has been dedicated to assuring a strong and healthy broad-based consumer lending services industry that (i) provides the public with a quality and cost effective service; (ii) promotes

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[1] Petitioners have consented to the filing of this brief; their consent is reflected in correspondence that has been lodged with the Clerk. Respondents have not consented to this submission.

a financial system that enhances competitiveness; and (iii) supports the responsible delivery and use of credit and credit-related products.

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing over 400 companies that write property and casualty insurance in every state and jurisdiction of the United States. AIA's goals are to promote the economic, legislative, and public standing of its members; to provide a forum for discussion of policy problems of common concern to its members and the insurance industry; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. AIA is headquartered in Washington, D.C., maintains five regional offices, and retains legislative counsel in every state. Among its other activities, AIA prepares amicus briefs in cases before state and federal courts on issues of importance to the insurance industry.

The "common defense" rule adopted by the Fifth Circuit in this case, if left undisturbed, will have a direct and significant impact on Amici's respective memberships and on commercial interests throughout the nation. In view of the dramatic expansion of business tort litigation in certain states, it is more important than ever that courts protect out-of-state businesses' valuable statutory right to a federal forum. The very purpose of diversity jurisdiction is the avoidance of local prejudice—a protection invaluable to both the rule of law and the functioning of our free market economy. The Fifth Circuit's common defense rule dramatically impairs an out-of-state defendant's ability to remove state tort litigation to federal court when no real in-state defendant is present. If this Court does not intervene, this rule will further fuel the explosion of business tort

litigation in certain state jurisdictions, to the detriment of the nation's economy.

Accordingly, Amici move for leave to file the attached brief to assist the Court in evaluating the petition for a writ of certiorari in this case.

Respectfully submitted.

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BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONERS

INTEREST OF THE AMICI[2]

The interest of the Amici is set forth in the foregoing Motion for Leave to File.

SUMMARY OF ARGUMENT

An en banc ruling from a deeply divided Fifth Circuit Court of Appeals has placed that court in direct conflict with the Ninth Circuit on a critical issue of federal diversity jurisdiction. Under the doctrine of fraudulent joinder, the presence of an in-state defendant in a complaint does not defeat diversity jurisdiction if there is no reasonable possibility that the plaintiff will recover against that defendant. Under these circumstances, the in-state defendant is deemed to be fraudulently joined and may be ignored for purposes of diversity jurisdiction.

In this appeal, a majority of the Fifth Circuit departed from that long-standing rule and imposed a new hurdle for defendants seeking to invoke the fraudulent joinder doctrine. Joining the Third Circuit Court of Appeals in *Boyer* v. *Snap-On Tools Corp.*, 913 F.2d 108 (3d Cir. 1990), the Fifth Circuit held that before a court may consider whether fraudulent joinder applies, it must first decide whether the defense that would defeat the claims against the resident defendant would also apply to the claims against the non-resident defendant. Pet. App. 8a-9a. If the defense is "common" to all defendants and equally disposes of all

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[2] This brief was not authored in whole or in part by counsel for any party in this case, and no one other than amici, their members, and their counsel made any monetary contribution to its preparation or submission. S. Ct. R. 37.6.

claims in the case, the court cannot find fraudulent joinder and must remand the case to state court, even if there is no reasonable possibility that the plaintiff will recover against the resident defendant. The Ninth Circuit has reached the opposite conclusion, holding that the resident defendant may be deemed fraudulently joined even though the claims against the out-of-state defendant fail for the same reason. *Ritchey* v. *Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998).

This conflict among the circuits on the scope of fraudulent joinder arises from the courts' differing interpretations of *Chesapeake & Ohio Railway Co.* v. *Cockrell*, 232 U.S. 146 (1914), a long-dormant decision of this Court. In using *Cockrell* as the basis for their common defense rule, however, the Third and Fifth Circuits extended that decision far beyond its factual context. Moreover, the decision in *Cockrell* preceded this Court's sea-change ruling in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). Before *Erie*, when federal courts sitting in diversity decided disputed questions based on federal common law, as required by *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), considerations of comity would have made courts more reluctant to retain cases based on diversity jurisdiction. Any comity concerns that may have informed the *Cockrell* decision, however, were greatly diminished after *Erie*, which overruled *Swift* v. *Tyson* and empowered federal courts to apply state law.

The question presented in this case is of critical importance to corporations that participate in interstate commerce. Even members of the plaintiffs' trial bar have admitted that certain state courts have become "magic jurisdictions," where non-resident corporate defendants are unlikely to obtain a fair trial. Diversity jurisdiction is an important, necessary, and appropriate recourse for non-resident defendants who face lawsuits in these jurisdictions.

By creating a new hurdle for establishing fraudulent joinder, the Fifth and Third Circuits have fundamentally altered the right of a non-resident defendant to obtain a federal forum on the basis of statutory diversity jurisdiction. Indeed, in many cases, the common defense rule will enable a plaintiff to keep a meritless case against a non-resident defendant out of federal court simply by asserting the same meritless claims against a resident defendant. This is exactly the sort of manipulation of federal jurisdiction that the fraudulent joinder doctrine was intended to prevent.

Moreover, without this Court's intervention, the availability of diversity jurisdiction will differ depending upon where the state court suit is filed, and this disparity will exacerbate the problem of forum shopping in business tort cases. Indeed, if the Fifth Circuit's decision is allowed to stand, the states within that circuit — which already attract a disproportionate number of business tort lawsuits — will become even more attractive to the plaintiffs' bar, as a suit filed within that Circuit will be more likely to remain in state court than a suit filed elsewhere.

The petition demonstrates why review is warranted, given the conflict of authority with regard to the common defense exception to fraudulent joinder. Accordingly, in order to avoid burdening the Court with a duplicative discussion of the case law, this brief will focus on three particular aspects of the issue from the perspective of national commerce. First, this brief discusses how the common defense rule adopted by the Third and Fifth Circuits undermines a defendant's right to diversity jurisdiction and exacerbates the very harms that the doctrine of fraudulent joinder was designed to prevent. Second, it evaluates the doctrine's relevance in terms of the growing problem of bias against non-resident corporate defendants in certain "magic" state court jurisdictions. And finally, this brief discusses the practical and historical context of *Cockrell*,

which the Fifth and Third Circuits ignored when they used that ninety-year-old decision to create the new exception to fraudulent joinder.

For all these reasons, and for those set out in the Petition, Amici urge this Court to grant a writ of certiorari in this matter. This Court's intervention is necessary to resolve the split among the circuits, to prevent any further misuse of its decision in *Cockrell*, and to clarify the scope of diversity jurisdiction.

BACKGROUND

Respondent Kelli Smallwood is a Mississippi resident who was injured when her car collided with a locomotive at a railroad crossing in Florence, Mississippi. Smallwood filed an action in Mississippi state court against the Illinois-based Illinois Central Railroad Company, which operated the train, as well as against the Mississippi Department of Transportation (MDOT), which controlled the crossing. Smallwood claimed that MDOT negligently provided inadequate warning devices at the railroad crossing and that both defendants were negligent in delaying the installation of additional warning devices.

Illinois Central removed the case to federal court on the ground that MDOT could not possibly be held liable in the case and thus its citizenship could be ignored for purposes of diversity jurisdiction. The railroad argued that Smallwood had no chance of recovering against MDOT (the resident defendant) because the Federal Railroad Safety Act preempted both of the claims against it. See 49 U.S.C. § 20101, et seq. The district court agreed, found that MDOT had been improperly joined, and denied Smallwood's motion to remand. The court then granted summary judgment in favor of Illinois Central based on the same preemption defense.

On appeal, a panel of the Fifth Circuit concluded that Illinois Central had not carried its burden of showing fraudulent joinder and ordered that the district court remand the matter to state court. The Fifth Circuit then agreed to hear the case en banc.

In a sharply divided opinion, the en banc court voted to adopt a common defense exception to the doctrine of fraudulent or "improper" joinder. Pet. App. 8a-9a. Under this new rule:

> When the only proffered justification for improper joinder is that there is no reasonable basis for predicting recovery against the in-state defendant, and that showing is equally dispositive of all defendants rather than to the in-state defendants alone, the requisite showing has not been made.

Pet. App. 8a. In such a case, according to the majority, "there is no improper joinder; there is only a lawsuit lacking in merit." *Id.* at 7a.

The majority based its conclusion in significant part on its interpretation of this Court's decision in *Chesapeake & Ohio Railway Co.* v. *Cockrell*, 232 U.S. 146 (1914), which also considered the question of diversity jurisdiction in a case against a non-resident railroad. In that case, however, the alleged liability of the railroad was based exclusively on its vicarious liability for the actions of the two resident defendants. This Court held that the mere argument that the plaintiff's allegations against the defendants were each and all "false and untrue" was not sufficient to establish fraudulent joinder, because it "manifestly went to the merits of the action as an entirety, and not to the joinder." 232 U.S.

at 151, 153. The *Smallwood* majority used this Court's decision in *Cockrell* as a basis for its decision that a finding of fraudulent joinder can never rest on a defense that is "common" to all defendants—even if there is no reasonable possibility of recovery against the resident defendant. Pet. App. 7a-8a. In doing so, the majority did not address the fact that, rather than asserting and proving a defense to the claims against the in-state defendant, the defendants in *Cockrell* merely denied the factual allegations. The majority also did not consider the fact that *Cockrell* was handed down before *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), at a time when federal courts were more reticent to delve into matters of state law.

Judge Jolly authored the lead dissenting opinion, in which six of his colleagues joined. The dissenters rejected the majority's common defense rule, explaining that the majority's opinion

> misreads the Supreme Court decision [in *Cockrell*], disregards established precedent, designs a troublesome and unnecessary "common-defense" rule to amend a long established and fairer rule, offers meaningless reasoning to support its decision and creates confusion for the district courts—all for no other reason, as far as I can determine, than the satisfaction in finding a "buried treasure" obscured from our judicial predecessors for almost a century.

Pet. App. 12a (Jolly, J., dissenting).

On December 9, 2004, Illinois Central and MDOT filed their petition for a writ of certiorari in this Court.

ARGUMENT

I. The common defense rule exacerbates the very harms that diversity jurisdiction and the fraudulent joinder doctrine are designed to prevent.

A. Diversity jurisdiction gives non-resident defendants a right to an unbiased forum.

For more than 200 years, the basic goal of diversity jurisdiction has been to assure non-resident litigants access to "courts free from susceptibility to potential local bias." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 111 (1945); see also *Burgess* v. *Seligman*, 107 U.S. 20, 34 (1883) (explaining that diversity jurisdiction was established "to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices"); *Pease* v. *Peck*, 59 U.S. (18 How.) 595, 599 (1855) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly, the state tribunal might not be impartial between their own citizens and foreigners."). It was for that reason that the Judiciary Act of 1789 vested federal courts with original jurisdiction over controversies "between Citizens of different States." U.S. Const. art. III, § 2; see 28 U.S.C. § 1332.

Even in the early days of the federal judiciary, the need for a federal tribunal that would resolve disputes between citizens of different states was based as much on the appearance or apprehension of parochial bias as it was on demonstrable proof that such bias existed. As Chief Justice John Marshall explained in 1809:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to

> parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of the U.S. v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); cf. *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) ("It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim.").

Because the identity of the parties is often a matter of pleading within the plaintiff's control, this Court has long recognized a need for a mechanism to prevent a plaintiff from manipulating the pleadings to avoid diversity jurisdiction. To that end, nearly 100 years ago, this Court determined that a plaintiff could not evade diversity jurisdiction by joining as a defendant a non-diverse party against whom he could not prevail. *Wecker* v. *Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 182-83 (1907) ("[T]he Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.") (quotations omitted). In *Wecker*, this Court recognized that federal courts "should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Id.* at 186; see also *Alabama Great S. Ry. Co.* v. *Thompson*, 200 U.S. 206, 218 (1906) ("[T]he Federal courts may, and should, take

such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.").[3]

For nearly nine decades after *Wecker*, the federal courts have followed the basic rule that an in-state defendant against whom the plaintiff has no reasonable possibility of prevailing may be disregarded for purposes of diversity jurisdiction. See, *e.g.*, *Travis* v. *Irby*, 326 F.3d 644, 647 (5th Cir. 2003) (test for fraudulent joinder is whether the plaintiff has any "reasonable possibility" of prevailing against the non-diverse defendant); *Schwartz* v. *State Farm Mut. Auto Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999) (same effect); *B., Inc.* v. *Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981); *Smoot* v. *Chicago, Rock Island & Pac. R.R. Co.*, 378 F.2d 879, 882 (10th Cir. 1967) ("The joinder of a resident defendant against whom no cause of action is stated is patent sham, ... and though a cause of action be stated, the joinder is similarly fraudulent if in fact no cause of action exists.") (citations omitted); *Parks* v. *New York Times Co.*, 308 F.2d 474, 476-78 (5th Cir. 1962) (fraudulent joinder is established by showing that the plaintiff cannot prevail against the non-diverse defendant); *Lobato* v. *Pay Less Drug Stores, Inc.*, 261 F.2d 406, 408-09 (10th Cir. 1958) (affirming denial of remand where plaintiff had failed to provide facts sufficient to state a claim against in-state defendants); *Morris* v. *E.I. Dupont de Nemours & Co.*, 68 F.2d 788, 792-93 (8th Cir. 1934) (fraudulent joinder is established when a plaintiff has no reasonable possibility of prevailing against the non-diverse defendant).

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[3] The doctrine of fraudulent joinder adopted in *Wecker* is also reflected in the removal statute, 28 U.S.C. § 1441 (b), which provides that an action may be removed on the basis of diversity jurisdiction "only if none of the parties in interest *properly* joined and served as defendants is a citizen of the State in which such action is brought" (emphasis added).

These courts have consistently held that fraudulent joinder is based upon an evaluation of whether the plaintiff has a reasonable possibility under state law of recovering from the resident defendant—without consideration of the plaintiff's actual motives in including that defendant in the pleading. See *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U.S. 183, 189 (1931) ("[I]n a removal proceeding the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined.").

In 1990, the Third Circuit abandoned this long-standing rule, concluding that even if the plaintiff had no hope of recovering from the in-state defendant, that defendant's citizenship could not be disregarded if the defense that would defeat those claims was also dispositive of claims against the out-of-state defendant. *Boyer* v. *Snap-On Tools Corp.*, 913 F. 2d 108 (3d Cir. 1990). The Fifth Circuit's opinion in this case follows *Boyer* and deepens a split between the Third Circuit in *Boyer*, on the one hand, and the Ninth Circuit and (impliedly) the Seventh Circuit on the other. See *Ritchey* v. *Upjohn Drug Co.*, 139 F.3d 1313, 1318-20 (9th Cir. 1998) (expressly rejecting the argument that fraudulent joinder could not exist where the statute of limitations defense that defeated claims against the in-state defendant would also defeat claims against the out-of-state defendants); *LeBlang Motors, Ltd.* v. *Subaru of Am., Inc.*, 148 F.3d 680, 691-92 (7th Cir. 1998) (finding fraudulent joinder based upon statute of limitations defense that would have applied equally to claims against out-of-state defendants).

B. The common defense rule undermines the purposes of the fraudulent joinder doctrine.

The common defense exception to the fraudulent joinder doctrine legitimizes the very sort of manipulation that the doctrine itself was designed to prevent. Under the

Fifth Circuit's rule, a plaintiff with a meritless claim against a non-resident defendant can frustrate that defendant's ability to remove the case simply by asserting the same meritless claims against a resident defendant, in the hopes that a state court would be more likely to allow the meritless claims to proceed. Absent proof of actual fraud— or proof that the claims against the resident defendants fail for additional reasons that apply to them uniquely — the removing defendant in such a case would have no recourse. Thus, the Fifth Circuit has effectively handed the power over the forum to the plaintiff exclusively, even where diversity jurisdiction would otherwise exist.

Indeed, the approach taken by the Fifth and Third Circuits gives rise to an ironic public policy conundrum: a case that is partially valid can be removed, but a case that is totally baseless as to all defendants will be remanded to state court, where that state court may improperly breathe life into the plaintiff's meritless claims.

This issue is of particular significance in business tort cases against corporations in national commerce. Corporate entities act through their agents, and a major national corporation doing business in a particular state is bound to have agents or employees who live there. Under the Fifth Circuit's rule, a plaintiff with a meritless tort claim against the corporation can defeat diversity jurisdiction by asserting the same claims against one of the corporation's in-state employees, as long as the claims against the employee would suffer from the same deficiencies as the claims against the corporation. In this manner, the Fifth Circuit's rule sharply curtails diversity jurisdiction for out-of state corporate defendants in nationwide commerce — the very defendants who most often need the protections of diversity jurisdiction in today's climate.

II. Diversity jurisdiction is particularly important to non-resident defendants who face suit in one of the so-called magic state court jurisdictions.

It is no secret that in certain state courts, a non-resident corporate defendant stands little chance of getting a fair trial. Even if the vast majority of states would fairly adjudicate a private tort suit by one or more of its citizens against a major national corporation, the existence of even a few biased jurisdictions has a tremendously detrimental impact on the orderly operation of commerce in this nation.

These "magic jurisdictions" — so named by some of the most prominent members of the plaintiffs' bar — have developed reputations as extremely friendly to suits against corporate defendants and, as a result, attract a disproportionate amount of business tort and consumer fraud litigation. Richard Scruggs, a leading plaintiffs' lawyer, recently described the attributes of such courts:

> [W]hat I call the "magic jurisdiction" ... [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected .... They've got large populations of voters who are in on the deal .... And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places .... There are probably a dozen magic jurisdictions around the country where this is really a dangerous thing. The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is.

R. Scruggs, Remarks in a Panel Discussion at the Prudential Securities Financial Services and Regulatory Conference (May 9, 2002) (published under the title *Asbestos for Lunch* by Prudential Financial Research, June 11, 2002); see also J. Copland, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16; Colloquium, *Tobacco Lawyers' Roundtable: A Report from the Front Lines*, 51 DEPAUL L. REV. 543, 545 (2001) (quoting Richard Scruggs as stating that there are "probably a dozen or so magic jurisdictions around the country that any company that goes to trial there runs the risk of enormous multi-billion dollar punitive damages").

As the former president of the Mississippi Trial Lawyers Association has candidly admitted, resisting removal from one of these magic jurisdictions to federal court tends to be outcome determinative:

> The general public may say, "Who cares — state court, federal court, what difference does it make?" In our state, it's the difference between winning and losing. I've gotten many multimillion-dollar judgments in state court over my 17-year career, but I've never won a judgment of any significant size for plaintiffs in federal court.

R. Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1, *available at* 2001 WLNR 3348715 (quoting Shane F. Langston).

Madison County, Illinois, for example — which some regard as "'the most magic of all' magic jurisdictions" — has developed a well-known reputation for bias against corporate defendants and attracts litigation against defendants from across the nation. See V. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge*

Ahead, 16 WASH. U. J.L. & POL'Y 235, 235-36 (2004) (quoting G. Burns, *Lawyers Bring an International Class Action to Rural Madison County ... Why? Because It's the Lawsuit Capital*, CHI. TRIB., Mar. 8, 2004, at 1). Indeed, Madison County now ranks third nationwide — behind the far more populous counties containing Los Angeles and Chicago — in terms of the number of class action filings each year. J. Beisner & J. Davidson Miller, *They're Making a Federal Case Out of It ... In State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 159 (2001).

West Virginia has also established itself as a magic jurisdiction for plaintiffs in mass tort cases. See AMERICAN TORT REFORM FOUND., JUDICIAL HELLHOLES 2004, at 23-24 (2004), *available at* www.atra.org ("JUDICIAL HELLHOLES"). One West Virginia Supreme Court of Appeals Justice candidly acknowledged the bias in his jurisdiction more than fifteen years ago, writing, "As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone[] else['s] money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me." E. Helland & A. Tabarrok, *Exporting Tort Awards*, REGULATION MAGAZINE, Summer 2000, at 21, 22 (quoting R. NEELY, THE PRODUCT LIABILITY MESS 4 (New York: The Free Press 1988)).

Within the Fifth Circuit, the courts of Mississippi reigned for several years as a "mecca for plaintiffs' claims against out-of-state businesses." *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 774 (5th Cir. 2001). Accordingly, it is not surprising that the Fifth Circuit has faced more than its share of removal petitions and has played a central role in the development of modern removal jurisprudence.

Although Mississippi's attractiveness as a plaintiffs' venue is in decline, thanks to significant legislative and judicial intervention, both of the other states within the Fifth

Circuit still include magic jurisdictions. Jefferson County, Texas and Orleans Parish, Louisiana rank fifth and sixth, respectively, on the American Tort Reform Foundation's annual listing of "Judicial Hellholes." JUDICIAL HELLHOLES, *supra*, at 25-27. In the litigation over the popular diet drug Fen-Phen, for example, a jury in Jefferson County, Texas recently awarded a verdict of $1.013 billion to the family of a single patient who had suffered from primary pulmonary hypertension (PPH) after taking several different diet drugs — a staggering verdict, considering that defendant Wyeth Pharmaceuticals had settled the majority of its Fen-Phen cases (more than 125,000 claims alleging heart valve damage, which is less serious than PPH) for a total of $3.75 billion. *Id.* at 25. And in Louisiana, a court ordered tobacco companies to pay a judgment of $591 million — not for medical costs or to compensate for actual injuries — but to fund a comprehensive smoking cessation program. *Id.* at 27. The defendants in those cases were barred from introducing evidence that the 1998 Master Settlement Agreement (which settled disputes between states' attorneys general and the tobacco industry) was already funding extensive public education campaigns. *Id.*

Given the prominence of these and other "magic" state court jurisdictions both inside and outside the Fifth Circuit, the en banc decision in this case is all the more significant. The adoption of the common defense rule has the potential to fuel the explosion of tort litigation in these jurisdictions. In the Fifth Circuit, for example, the common defense rule—which makes it far more difficult for corporate defendants to remove cases from state court—will provide a continued inducement to plaintiffs' lawyers around the country to choose the courts of Mississippi, Texas, and Louisiana for significant business tort litigation against major national commercial interests. Through the facile expedient of adding a single resident defendant—even where there is no reasonable possibility of recovery against

that defendant or any other—plaintiffs will be able to increase their odds of resisting removal to federal court and will be one step closer to a favorable result. See, *e.g.*, M. Ballard, *Mississippi Becomes a Mecca for Tort Suits; Fayette, Pop. 8,345, Is a Major Venue for Diet Drug Litigation*, NAT'L L.J., Apr. 30, 2001, at A1 (discussing the plight of a family-owned pharmacy in Jefferson County, Mississippi that is named in "nearly every suit" alleging the defective manufacture of diet drugs).

The impact of these developments on nationwide commerce cannot be overstated. Entire industries are frequently the targets of cookie-cutter complaints in these and other magic jurisdictions. In the consumer finance and insurance industries, for example, a veritable flood of cases has been filed by plaintiffs in Mississippi alleging boilerplate tort and contract claims against non-resident companies and their in-state employees or agents. Many of these claims are based on transactions that were entered into as many as ten years ago. These claims frequently are subject to defenses that may be invoked by diverse and non-diverse defendants alike, such as the statute of limitations. See, *e.g.*, *Howard* v. *CitiFinancial, Inc.*, 195 F. Supp. 2d 811 (S.D. Miss. 2002) and *Ross* v. *Citifinancial, Inc.*, 2002 WL 461567, No. 5:01-CV-185BN (S.D. Miss. Mar. 18, 2002), aff'd in *Ross* v. *Citifinancial, Inc.*, 344 F.3d 458 (5th Cir. 2003) (petition for reh'g en banc pending). Plaintiffs in these cases are already relying upon the Fifth Circuit's decision in the instant appeal to argue that the presence of in-state employees and agents as defendants defeats diversity jurisdiction, even though the claims against those individuals are time-barred or otherwise meritless and plaintiffs have no hope of prevailing on them.

Diversity jurisdiction exists to protect against this very sort of unfairness. This Court's intervention is necessary to ensure that the statutory protections of

diversity jurisdiction are respected uniformly in the federal courts and are available to out-of-state defendants who would otherwise be entitled to invoke them.

III. The Fifth Circuit's interpretation of *Cockrell* ignores the historical context of that case.

In adopting the common defense rule, both the Fifth Circuit in *Smallwood* and the Third Circuit in *Boyer* relied heavily on *Chesapeake & Ohio Railway Co.* v. *Cockrell*, 232 U.S. 146 (1914), a nearly century-old and long-dormant decision of this Court. See Pet. App. 7a-8a; *Boyer*, 913 F.2d at 112-13. As the dissent in this case made clear, the Fifth Circuit "misread" and "vastly overstated the implications of *Cockrell*." Pet. App. 19a (Jolly, J., dissenting); see also Pet. at 12-14 (discussing the significant flaws in the majority's analysis of *Cockrell* and the resulting split in the circuits on the meaning of that decision).

In addition to the problems identified by the dissent and by the Petition already filed in this case, the Fifth Circuit's analysis of *Cockrell* also suffers from one other fatal flaw: it ignores the fact that *Cockrell* was decided before this Court fundamentally changed the role of federal courts in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). *Cockrell* was decided under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), in which federal courts were required to adjudicate diversity cases based on federal common law, even when the application of state common law may have resulted in a different outcome. In that context, considerations of comity would almost certainly have made federal courts more reluctant to retain cases based on diversity jurisdiction. After *Swift* was overruled in *Erie*, however, a federal court is now required to interpret, predict, and apply state law in diversity cases. Indeed, after *Erie*, a federal court sitting in diversity is "only another Court of the State" required to apply state law as a state court would. *Guaranty Trust Co.* v.

York, 326 U.S. 99, 108 (1945), overruled on other grounds by *Hanna* v. *Plumer*, 380 U.S. 460 (1965). Given that dramatic change in the role of federal courts, any comity concerns that the Court in *Cockrell* may have had about the propriety of a federal court's evaluation of claims against in-state defendants will have greatly diminished, as the law applied by state and federal courts will now be the same.

It is therefore not surprising that, as the *Smallwood* dissenters observed, "the two most authoritative treatises on federal practice" neither cite *Cockrell* for a "common defense" limitation on the fraudulent joinder doctrine nor intimate that such a limitation even exists (Pet. App. 17a-18a. (Jolly, J., dissenting)), particularly after *Erie* so fundamentally changed the role of federal courts in diversity cases. Indeed, in the case of *Pullman Co.* v. *Jenkins*, 305 U.S. 534 (1939) — issued shortly after *Erie* — this Court confirmed that a non-resident defendant has a broad right to show fraudulent joinder, commenting that "[i]t is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove." *Id.* at 541.

CONCLUSION

For all the reasons discussed above, and for the reasons set out in the Petition, Amici urge this Court to grant a writ of certiorari in this case.

Respectfully submitted.

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No. 04-831

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY and MISSISSIPPI DEPARTMENT OF TRANSPORTATION,

Petitioners,

v.

KELLI SMALLWOOD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION AND BRIEF OF *AMICI CURIAE* BRYAN D. COLLINS, *ET AL.*, AND JOHN W. STEWART, *ET AL.*, IN SUPPORT OF RESPONDENT

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MOTION OF BRYAN D. COLLINS, *ET AL.*, AND JOHN W. STEWART, *ET AL.*, FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This motion for leave to file a brief *amicus curiae* is filed on behalf of the respondents in *American Home Products, et al. v. Bryan D. Collins, et al., and John W. Stewart, et al.*, No. 04-674, which is on petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Counsel for respondent in this case – *Smallwood* – have declined to consent to the filing of a brief *amicus curiae*, thereby necessitating the filing of this motion.

Amici have a direct interest in this case because it presents the same issue as *Collins*. In *Collins*, the parents of children who suffered severe health problems after being injected with vaccines containing the preservative thimerosal filed suit in Mississippi state court against diverse and in-state defendants, and the defendants removed the case. The district court found that the Mississippi defendants had been fraudulently joined because the plaintiffs had not exhausted their administrative remedies, as required by the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1 *et seq.* ("Vaccine Act"). Having held that removal was proper, the court then dismissed the entire case on the ground that plaintiffs had not exhausted their Vaccine Act remedies as to the claims against any defendant. On appeal to the Fifth Circuit, the case was consolidated with *Stewart v. American Home Products Corp.*, which arose from the same set of facts. *See Collins v. Am. Home Prods. Corp.*, 343 F.3d 765, 768 (5th Cir. 2003).

The Fifth Circuit's brief opinion quoted *Smallwood* for the proposition that "[w]here there are colorable claims or

defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court." *Collins*, 343 F.3d at 768-69 (quoting *Smallwood v. Ill. Cent. R.R. Co.*, 342 F.3d 400, 405 (5th Cir. 2003) (quoting *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 113 (3d Cir. 1990))). Accordingly, the Fifth Circuit vacated the dismissal of plaintiffs' claims and remanded with instructions to the district court to remand *Collins* and *Stewart* to state court.

Because the analysis in *Smallwood* formed the basis for the Fifth Circuit's decision in the case in which *amici* are respondents, *amici* have a strong interest in the disposition of the petition in this case. They ask therefore that they be granted leave to file the accompanying brief *amicus curiae* supporting denial of the petition for a writ of certiorari.

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March 14, 2005

QUESTION PRESENTED

Whether a defendant can remove a case containing diverse and non-diverse defendants based on a theory of fraudulent joinder when the argument proffered to prove fraudulent joinder, if correct, would be dispositive of the case against both the diverse and the non-diverse defendants.

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INTEREST OF *AMICI*[1]

As set out in detail in the accompanying motion for leave to file this brief, *amici* have a strong interest in this case because it presents the same question as *American Home Products, et al. v. Bryan D. Collins, et al., and John W. Stewart, et al.*, No. 04-674, in which *amici* are respondents.

STATEMENT OF THE CASE

Kelli Smallwood was injured when a train operated by Illinois Central Railroad Company hit her car at a railroad crossing in Mississippi. She filed suit in Mississippi state court against Illinois Central and against the Mississippi Department of Transportation (MDOT), which controlled the crossing where the accident occurred. Although MDOT was an in-state defendant, Illinois Central removed the case to federal court on the basis of diversity jurisdiction. The district court denied Ms. Smallwood's motion to remand, finding that MDOT was fraudulently joined because the claims against it are preempted by the Federal Railroad Safety Act (FRSA). The court subsequently dismissed MDOT and granted summary judgment to Illinois Central on the same ground upon which it had denied the motion to remand—that Ms. Smallwood's claims are preempted by FRSA. Pet. App. 2a-3a.

The Fifth Circuit reversed, refusing to find fraudulent joinder based on a defense that was equally dispositive of the claims against the diverse and non-diverse defendants. It indicated that finding fraudulent joinder under such

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[1]Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party and that no one other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

circumstances would be "contrary to the Supreme Court's century-old command in [*Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146, 153 (1914)] that the fraudulent joinder allegations be directed toward the joinder, not to 'the merits of the action as an entirety.'" Pet. App. 49a.

On en banc review, the Fifth Circuit affirmed the panel's decision. The court held that "when a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant." *Id.* at 2a. The court noted that the purpose of the fraudulent joinder theory is to determine whether in-state defendants have been properly joined. Here, although the diverse defendant made its preemption argument first with respect to the non-diverse defendant only, the argument did not go to the propriety of the joinder, but to the merits of the entire case. *Id.* at 7a. The court concluded by noting that the decision to extend federal jurisdiction to cases in which there was not complete diversity was a political decision that could only be made by Congress. *Id.* at 10a-11a.

REASONS FOR DENYING THE WRIT

A. There Is No Meaningful Circuit Split On The Question Presented.

1. Petitioners' primary argument for review is that there is a circuit split on the question presented. However, as amici explained in their opposition to the petition in *Collins*, no circuit court that has analyzed the issue has disagreed with the Fifth Circuit that fraudulent joinder cannot be based on a defense or claim that disposes of the case against both the

diverse and non-diverse parties. To the contrary, the only other federal circuit to have discussed the issue—the Third—reached the same conclusion as did the court below. *See Boyer v. Snap-On Tools*, 913 F.2d 108 (3d Cir. 1990).

Petitioners attempt to manufacture a conflict by pointing to *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998). There, however, the plaintiff did not argue that the common defense theory applied, and the court did not analyze the issue.[2] The Ninth Circuit's discussion of fraudulent joinder focused on whether the plaintiff stated a cause of action against the in-state defendants, given that the statute of limitations against them had already run. The court concluded that the plaintiffs did not state a cause of action and, thus, that the in-state defendants had been fraudulently joined. In the final paragraph of this discussion, the court noted, consistently with the tenor of *Boyer* and the decision below, that it was "slightly peculiar" to call the in-state defendants sham defendants when the statute of limitations had also run against the diverse defendant. *Id.* at 1320. Then, in a single sentence and without citation to any authority, the court stated that, nonetheless, the failure to state a claim demonstrated that the in-state defendants were sham defendants. *Id.* Petitioners' assertion that there is a split among the circuits depends entirely on this passing observation by the Ninth Circuit.[3]

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[2]The plaintiff's appellate briefs in *Ritchey* are available on Westlaw at 1996 WL 33417453 and 1997 WL 33493575.

[3]Petitioners also contend that the Seventh Circuit "implicitly declined to adopt *Boyer*," citing *LeBlang Motors, Ltd. v. Subaru of America., Inc.*, 148 F.3d 680 (7th Cir. 1998). Pet. 11.

(continued...)

2. Petitioners also suggest a conflict in the circuits regarding the meaning of *Cockrell*. Yet Petitioners do not cite a single case that considered and disagreed with the *Boyer* and *Smallwood* courts' interpretation of *Cockrell*. Although Petitioners suggest that, in *Ritchey*, the Ninth Circuit "recognized" that *Boyer* and *Smallwood* misread *Cockrell*, Pet. 13, *Ritchey* does not mention *Boyer* (the only one of the two cases to have been decided before *Ritchey*), and, more fundamentally, it does not cite *Cockrell* in its two-sentence aside on whether a defense common to all parties can be the basis for fraudulent joinder.

3. Unable to cite any cases in which courts analyzed the question presented and disagreed with *Smallwood*'s holding, Petitioners focus on the "traditional test" for fraudulent joinder and try to make it appear that the decision below conflicts with cases that have applied that test. *See* Pet. 7, 9-10. *Smallwood* itself, however, properly stated that test. Pet. App. 5a. The Fifth Circuit then explained that the test is not sufficient in the narrow set of cases in which the defense upon which fraudulent

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[3](...continued)
LeBlang did not even consider whether fraudulent joinder could be based on defenses shared by diverse and non-diverse defendants. Rather, it upheld the dismissal of non-diverse defendants as fraudulently joined because the statute of limitations against them had run, without mentioning in the discussion of fraudulent joinder that at the time the case was filed the statute of limitations against the diverse defendant had run as well. The opinion offers no indication that the court gave any thought to the question presented here, and that question is not an aspect of the Seventh Circuit's holding.

joinder is based disposes of the claims against all defendants, because the defendant's arguments in those cases are not actually "going to the propriety of the joinder." *Id.* at 7a. That the court thought the test was inadequate under these factual circumstances does not establish a conflict with cases applying the test under other circumstances.

Because there is no circuit split among courts that have analyzed the question presented or that have analyzed *Cockrell* in the context of the question presented, the petition should be denied.

B. Petitioners Exaggerate The Importance Of The Question Presented.

Petitioners present a parade of horribles that they claim will result if this Court does not grant the petition. However, they vastly overstate the importance of the question presented and its impact on removal.

First, Petitioners note that hundreds of removal petitions based on diversity jurisdiction are filed each year and that in a significant portion of those cases the defendants claim that the in-state defendants have been fraudulently joined. Pet. 14. Petitioners may be right, but the decision below does not apply to most of those cases. Rather, it applies only in the narrow set of cases in which the claim of fraudulent joinder is based on a defense that disposes of the claims against the in-state and diverse defendants alike.

Second, Petitioners' claim that the decision below will create federal-state friction is unfounded. *See* Pet. 15. Contrary to Petitioners' assertions, the decision below does not indicate that federal courts are incompetent to make decisions on merits

issues. Rather, it concludes that federal courts cannot decide merits issues in the guise of determining whether there is diversity jurisdiction.

Finally, Petitioners exaggerate in asserting that *Smallwood* will cause plaintiffs to join MDOT in every railroad crossing case filed in Mississippi to defeat diversity jurisdiction. *See* Pet. 17. *Smallwood* would apply only if a defense that would keep the plaintiff from recovering against MDOT in state court were equally applicable to the diverse defendant. This circumstance will not be true of every railroad case.

C. The Decision Below Is Correct.

This Court has recognized that when a showing "indicate[s] that the plaintiff's case was ill founded as to all the defendants," such a showing goes "to the merits of the action as an entirety, and not to the joinder." *Cockrell*, 232 U.S. at 153 (1914). In other words, such a showing does not "engender or compel the conclusion that the [in-state defendants] were wrongfully brought into a controversy which did not concern them." *Id.*

Both the Third and Fifth Circuits have applied *Cockrell* to hold that defenses that are determinative of the claims against all of the defendants cannot be used as a basis for a finding of fraudulent joinder. Those courts recognized that when a court concludes that a case is untenable as to all defendants, it is not deciding an issue related to joinder; rather, it is determining the entire case. "In such cases, it makes little sense to single out the in-state defendants as 'sham' defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such[.]" Pet. App. 7a.

The courts of appeals' holdings on common defenses ensures that the theory of fraudulent joinder remains true to the purposes for which it was created. The fraudulent joinder doctrine is intended to guarantee that non-diverse defendants are not joined solely to defeat diversity jurisdiction. If a defense common to all defendants could form the basis for a finding of fraudulent joinder, then fraudulent joinder could be found in many cases in which the plaintiff did not sue the non-diverse defendant for the improper purpose of defeating diversity, but in which the plaintiff just had a weak case.

The decision below also protects the boundary between state and federal jurisdiction. Plaintiffs are entitled to have state courts decide the merits of cases alleging state-law claims against both diverse and non-diverse defendants. Diverse defendants often want to remove cases to federal court due to their perception that the federal forum will be more favorable to them. Under Petitioners' theory, such defendants can manipulate the system by removing the case, arguing their defenses as to the in-state defendants, and then arguing those exact same defenses as to the diverse defendants. Forbidding defenses common to all defendants from being used as the basis for a finding of fraudulent joinder ensures that fraudulent joinder is not used as a means to circumvent limits on federal jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

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